APPENDIX A OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY
A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v.

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

Argued January 21, 2009 – Decided February 2, 2010

JUSTICE ALBIN delivered the opinion of the Court.

Today, all the world is a market. In our contemporary international economy, trade knows few boundaries, and it is now commonplace that dangerous products will find their way, through purposeful marketing, to our nation's shores and into our State. The question before us is

whether the jurisdictional law of this State will reflect this new reality.

In this case, the foreign manufacturer of an allegedly defective and dangerous industrial machine targeted the United States economy for the sale of its product. The machine was sold to a New Jersey business by the manufacturer's exclusive American distributor. An employee of that New Jersey business lost several fingers while using the machine because the machine allegedly lacked a safety guard. The foreign manufacturer knew or reasonably should have known that by placing a product in the stream of commerce through a distribution scheme that targeted a fifty-state market the product might be purchased by a New Jersey consumer. We must resolve whether under those circumstances the manufacturer is subject to the jurisdiction of our State court system in a product-liability action.

We affirm the Appellate Division, which found the New Jersey Superior Court, Law Division, as the proper forum for this action. We also reaffirm our decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, in which we held that "the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." 102 N.J. 460, 480, 508 A.2d 1127 (1986). The increasingly fast-paced globalization of the world economy has removed national borders as barriers to trade and has proven the wisdom

of *Charles Gendler*. Due process permits this State to provide a judicial forum for its citizens who are injured by dangerous and defective products placed in the stream of commerce by a foreign manufacturer that has targeted a geographical market that includes New Jersey. *See id.* at 480-83, 508 A.2d 1127. The exercise of jurisdiction in this case comports with traditional notions of fair play and substantial justice.

I.

A.

On October 11, 2001, plaintiff Robert Nicastro, an employee for thirty years of Curcio Scrap Metal, was operating the McIntyre Model 640 Shear, a recycling machine used to cut metal. Nicastro's right hand accidentally got caught in the machine's blades, severing four of his fingers. The Model 640 Shear was manufactured by J. McIntyre Machinery, Ltd. (J. McIntyre), a company incorporated in the United Kingdom, and then sold, through its exclusive United States distributor, McIntyre Machinery America, Ltd. (McIntyre America), to Curcio Scrap Metal.

In September 2003, plaintiff named J. McIntyre and McIntyre America as defendants in a product-liability action, *N.J.S.A.* 2A:58C-2, in the Superior Court, Law Division, Bergen County. The complaint alleged that the shear machine manufactured by J. McIntyre and distributed by McIntyre America "was not reasonably

fit, suitable, or safe for its intended purpose."[1] The complaint, in particular, asserted that the machine "failed to contain adequate warnings or instructions," and that its defective design "allow[ed] the plaintiff to become injured while operating the machine in the normal course of his employment." The focus of this product-liability lawsuit, as made clear from plaintiff's expert's report, is that the McIntyre Model 640 Shear did not have a safety guard that would have prevented the accident. Plaintiff is seeking damages for past and future medical expenses, lost wages, and physical pain and suffering.[2]

B.

The trial court granted J. McIntyre's motion to dismiss the action, finding that the English manufacturer did not have sufficient minimum contacts with New Jersey to justify the State's exercise of personal jurisdiction over it. Alternatively, the court held that even under "the most liberal[ly] accepted form of the stream of commerce theory," J. McIntyre "would not be subject to personal jurisdiction in New Jersey."

In an unreported opinion, the Appellate Division reversed, allowing the parties to engage in discovery to

1. Nicastro's wife, Roseann, also a plaintiff, filed a loss-of-consortium claim in the same complaint. For the sake of convenience, we refer only to plaintiff Robert Nicastro.

2. McIntyre America, the distributor, filed for bankruptcy in 2001 and has not participated in this lawsuit.

establish whether New Jersey has the authority to exercise jurisdiction over J. McIntyre on the basis of either a traditional minimum-contacts analysis or the stream-of-commerce theory as articulated in *Charles Gendler* or in Justice O'Connor's plurality opinion in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987) (plurality opinion).

Here is the relevant information adduced during the discovery period. In either 1994 or 1995, Frank Curcio, the owner of Curcio Scrap Metal of Saddle Brook, New Jersey, attended a trade convention in Las Vegas, Nevada, sponsored by the Institute of Scrap Recycling Industries. While there, he visited the booth of McIntyre America and was introduced to the McIntyre Model 640 Shear.

In 1995, Curcio Scrap Metal purchased the machine from McIntyre America at a cost of $ 24,900. The machine was shipped from McIntyre America's headquarters in Stow, Ohio to Saddle Brook, and the invoice instructed that the check be made payable to "McIntyre Machinery of America, Inc." Affixed to the machine was a label with the following information: "J. McIntyre Machinery," its address, and the model and serial number of the machine. Curcio also received an information sheet listing J. McIntyre's address in Nottingham, England, as well as its telephone and fax numbers. An instruction manual that accompanied the shear machine referenced both United States and United Kingdom safety regulations. Based on

documentation received with the machine, Curcio concluded that "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts."[3]

J. McIntyre's principal place of business is in Nottingham, England, where it designs and manufactures metal recycling machinery and equipment. It holds American and European patents in recycling technology. Michael Pownall, the president of J. McIntyre, attended the scrap metal conventions held in Las Vegas in 1994 and 1995, including the one where Curcio visited the McIntyre America booth. Additionally, from at least 1990 until 2005, J. McIntyre officials, including Pownall, attended trade conventions, exhibitions, and conferences throughout the United States in such cities as Chicago, Las Vegas, New Orleans, Orlando, San Diego, and San Francisco. During the period that McIntyre America was the exclusive United States distributor for J. McIntyre's products, McIntyre America fielded any requests for information about those products at the scrap metal conventions and trade shows in the United States.

3. Curcio's perception, at the time of purchase and today, is in no way altered by a J. McIntyre representative's claim that "[J.] McIntyre does not, and never did, provide maintenance or repair services for its products to businesses or individuals in *New Jersey*." (Emphasis added). The representative did not suggest that J. McIntyre was not servicing its machines in states other than New Jersey.

Appendix A

J. McIntyre and its American distributor were distinct corporate entities, independently operated and controlled, without any common ownership. McIntyre America, however, "structured [its] advertising and sales efforts in accordance with [J. McIntyre's] direction and guidance whenever possible."[4] Although J. McIntyre claimed that it sold its machines outright to McIntyre America, the correspondence between the two companies suggests that at least some of the machines were sold on consignment to its American distributor. For example, in a 1999 letter to McIntyre America, J. McIntyre's president noted: "[Y]ou still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full." Indeed, in a 1999 e-mail, McIntyre America reported to J. McIntyre that it had "no problem waiting for [J. McIntyre] to receive payment from the customer first before requesting our commission via a company invoice in the future."[5]

At the conclusion of jurisdictional discovery, the trial court again granted J. McIntyre's motion to dismiss for lack of personal jurisdiction. The court emphasized that J. McIntyre had "no contacts with the state of New Jersey" it did not directly sell or solicit business in this State or have a physical presence here. Not only

4. This remark was set forth in a January 2000 letter from McIntyre America to J. McIntyre.

5. For a more detailed account of the "discovery" evidence, *see Nicastro v. McIntyre Mach. Am.*, Ltd., 399 N.J. Super. 539, 545-48, 945 A.2d 92 (App. Div. 2008).

did the court find no evidence establishing a connection between J. McIntyre and this State, but it also concluded that J. McIntyre had no "expectation that its product would be purchased and utilized in New Jersey." The court maintained that "[t]he fact that [J. McIntyre] may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey." In the court's view, J. McIntyre could be haled into a New Jersey court under the stream-of-commerce theory only if the company engaged in a nationwide distribution scheme that "purposefully brought [J. McIntyre's] shear machines to New Jersey" and the company "purposely availed itself of the protections of [this State's] laws."

II.

In an opinion authored by Judge Lisa, the Appellate Division reversed, concluding that the exercise of jurisdiction by New Jersey "would not offend traditional notions of fair play and substantial justice" and was justified "under the 'stream-of-commerce plus' rationale espoused by Justice O'Connor in *Asahi*." *Nicastro v. McIntyre Mach. Am., Ltd.*, 399 N.J. Super. 539, 545, 945 A.2d 92 (App. Div. 2008) (citing *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). The panel noted that in *Asahi* two different views of the stream-of-commerce doctrine of jurisdiction were advanced, one by Justice O'Connor and the other by Justice Brennan, with each view supported by four different members of the Court. *Id.* at 555-56, 945 A.2d

92. The panel held that the facts of this case met Justice O'Connor's more restrictive stream-of-commerce plus test, and therefore also satisfied Justice Brennan's framework for jurisdiction in stream-of-commerce cases. *Id.* at 557-58, 565, 945 A.2d 92.

The Appellate Division ultimately found that J. McIntyre not only "plac[ed] the shear machine that injured plaintiff into the stream of commerce by transferring it to its distributor, McIntyre America, with an awareness that its machine might end up in New Jersey, [but] also engaged in additional conduct indicating an intent or purpose to serve the New Jersey market." *Id.* at 558, 564-65, 945 A.2d 92 (citing *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). The Appellate Division identified a number of factors in reaching its determination: (1) J. McIntyre "designated McIntyre America as its exclusive distributor for the entire United States," and did so "for the purpose of selling its machines in all fifty states," *Id.* at 558, 945 A.2d 92; (2) J. McIntyre knew "that McIntyre America was not the end user of the many machines it sold to McIntyre America," *id.* at 559, 945 A.2d 92; (3) when J. McIntyre's management officials attended trade conventions in cities in this country, the company "was engaged in purposeful conduct to avail itself of the entire United States market," *ibid.*; (4) the sale to Curcio of the McIntyre Model 640 Shear "was the result of the very distribution scheme purposefully established by [J. McIntyre] for the sale of its machines to potential customers located anywhere within the exclusive sales territory of McIntyre America," which

included New Jersey, *ibid.*; and (5) J. McIntyre designed the Model 640 Shear "to conform to United States specifications and requirements, and represented such compliance in the instruction manual that came with the machine," *id.* at 564, 945 A.2d 92.

Last, the panel emphasized New Jersey's "strong interest in providing a forum for its injured workers who sustain industrial accidents" and the practical benefits of litigating the case in this State, where the injury occurred and where the evidence and most of the witnesses are located. *Id.* at 565, 945 A.2d 92. The panel also noted that it would not be unreasonable to expect J. McIntyre officials, who have visited this country to promote its products, to travel to this State to respond to claims that one of its defectively designed machines caused serious and permanent injuries to a worker operating it. *Id.* at 565-66, 945 A.2d 92. For those reasons, the Appellate Division had "no hesitancy" in finding J. McIntyre subject to the jurisdiction of the New Jersey Superior Court. *Id.* at 566, 945 A.2d 92.

We granted J. McIntyre's petition for certification. 196 N.J. 344, 953 A.2d 763 (2008). We also granted the motion of the Association of Trial Lawyers - New Jersey to participate in this case as amicus curiae.[6]

6. The Association of Trial Lawyers - New Jersey is now known as the New Jersey Association for Justice.

Appendix A

III.

Defendant J. McIntyre argues that the Appellate Division, in holding it subject to the jurisdiction of the New Jersey court system, did not properly apply Justice O'Connor's "stream-of-commerce plus" test as set forth in *Asahi*. Moreover, J. McIntyre posits that even under Justice Brennan's stream-of-commerce test, a New Jersey court could not assert its jurisdictional authority.

J. McIntyre disclaims any responsibility for the fact that its shear machine "made its way to New Jersey." It only admits that it did "limited business" in the United States and sold a purportedly defective machine to an Ohio distributor. It insists that it had no knowledge that the distributor would later sell the machine to a New Jersey customer. Because it claims to have had no role or control over the sale of the machine to a New Jersey business owner, J. McIntyre contends the "single act of placing the machine into the stream of commerce outside of New Jersey is not enough [for this State's courts] to exercise personal jurisdiction over [it] in accordance with due process." J. McIntyre disavows marketing its products in, or having any contacts or relationships with, New Jersey and therefore maintains that it would "offend traditional notions of fair play and substantial justice" for it to be subject to the jurisdiction of our courts. (Citation and internal quotation marks omitted). Finally, J. McIntyre submits that the Appellate Division has rendered meaningless Justice O'Connor's requirement that, in addition to placing a product in the stream of commerce, a manufacturer engage in

conduct "'purposefully directed toward the forum State,'" such as direct marketing or designing a product for a customer in a particular state. (Quoting *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104). Due process, it submits, does not empower a state, such as New Jersey, to exercise jurisdiction over a foreign manufacturer doing business generally in the United States.

In contrast, plaintiff Nicastro asks this Court to affirm the Appellate Division and find that J. McIntyre is subject to the jurisdiction of this State's courts because it targeted the United States as its geographical market and placed in the stream of commerce the defective industrial machine that permanently injured him. Plaintiff considers the jurisdictional issue at the heart of this case settled by this Court's decision in *Charles Gendler*. He asserts that J. McIntyre "sells its products throughout the United States, and yet claims immunity from suit anywhere, due to the strategy of using . . . [a] financially-irresponsible distributor with a nearly identical name." He prophesizes that "[t]o permit [J. McIntyre] to avoid personal jurisdiction in this products-liability matter will create a road-map for foreign manufacturers on how to dump their unsafe products in the United States" and escape liability in the state where their products cause personal injuries. Plaintiff urges that public policy should not allow such a "flanking maneuver" that will "leav[e] a catastrophically-injured citizen without legal recourse."

Appendix A

Amicus curiae, the Association of Trial Lawyers - New Jersey, urges this Court to reaffirm the stream-of-commerce doctrine adopted in *Charles Gendler* and espoused by Justice Brennan in *Asahi* as the basis for our courts to exercise jurisdiction over a foreign manufacturer whose defective product injures a New Jersey resident. The Association maintains that the use of the stream-of-commerce plus theory to "requir[e] additional conduct directed specifically to New Jersey . . . is a refusal to acknowledge the reality of globalization." It observes that "[n]o foreign manufacturer can expect to sell its product to the United States market, whether through a distributor or otherwise, without the product ultimately becoming located in one of the fifty states," and therefore J. McIntyre should not be surprised to be haled into a court of a state where its defective machine caused injury. Moreover, "[e]ven if there were personal jurisdiction over [J. McIntyre] in another State or the United Kingdom," the Association believes that requiring plaintiff to file a lawsuit in a place other than New Jersey, where he was injured and where everything relevant to his case is located, would defy this State's public policy to provide a forum for relief for workers victimized by defective products.

IV.

In determining whether our State courts have authority to exercise personal jurisdiction over J. McIntyre, we begin by dispensing with certain

jurisdictional doctrines that do not apply in this case.[7] We do not find that J. McIntyre had a presence or minimum contacts in this State in any jurisprudential sense that would justify a New Jersey court to exercise jurisdiction in this case. Plaintiff's claim that J. McIntyre may be sued in this State must sink or swim with the stream-of-commerce theory of jurisdiction. Before turning to that claim, a brief history of the development of our law governing jurisdiction will help inform our analysis.

A.

The power of a state to subject a person or business to the jurisdiction of its courts has evolved with the changing nature of the American economy. Our country has grown from an agrarian/manufacture-based economy dominated by local markets to a national economy fueled by the forces of industrialization. *See generally* Walter Licht, *Industrializing America: The Nineteenth Century* 133 (1995) (documenting evolution of American businesses from "producer[s] of small batches of goods sold in local and regional markets" to "marketers of mass-produced items nationally and even internationally"). Now, our nation

7. The facts in this case are basically undisputed. It is the legal consequences that flow from the facts that are at issue. Therefore, the standard of review is de novo. *See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.").

is part of a global economy driven by startling advances in the transportation of products and people and instantaneous dissemination of information. The expanding reach of a state court's jurisdiction, as permitted by due process, has reflected those historical developments.

In the nineteenth century, and earlier, a state court generally could not exercise personal jurisdiction over a non-resident defendant in accordance with due process unless the defendant was subject to process while physically present in the state. *See Pennoyer v. Neff*, 95 U.S. 714, 720-22, 24 L. Ed. 565, 568 (1878). That scheme emphasized the limits of a state's authority to subject a person outside its borders to the jurisdiction of its courts.

With the passage of time, technological progress in communications and transportation "increased the flow of commerce between States" and, correspondingly, "the need for [state courts to exercise] jurisdiction over nonresidents." *Hanson v. Denckla*, 357 U.S. 235, 250-51, 78 S. Ct. 1228, 1238, 2 L. Ed. 2d 1283, 1296 (1958). That same technological progress has "made it much less burdensome for a party sued to defend [it]self in a State where [it] engages in economic activity." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957). With the changing nature of the economy evolved a more flexible standard of jurisdiction "from the rigid rule of *Pennoyer v. Neff*." *Hanson, supra*, 357 U.S. at 251, 78 S. Ct. at 1238, 2 L. Ed. 2d at 1296. "In a continuing process of evolution [the United States Supreme Court] accepted and then

abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." *McGee*, *supra*, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225. The Court "expand[ed] the permissible scope of state jurisdiction over foreign corporations and other nonresidents" due in large part "to the fundamental transformation of our national economy." *Id.* at 222, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

In the mid-twentieth century, in *International Shoe Co. v. Washington*, the Court held that the State of Washington's courts could exercise personal jurisdiction over a Delaware corporation in proceedings instituted "to recover [the corporation's] unpaid contributions to the state unemployment compensation fund." 326 U.S. 310, 311, 321, 66 S. Ct. 154, 156, 161, 90 L. Ed. 95, 99, 105 (1945). The Delaware corporation had no offices or stock of merchandise in Washington but it directed eleven to thirteen salesmen who resided there and filled orders for products shipped into the state. *Id.* at 313-14, 66 S. Ct. at 157, 90 L. Ed. at 100. Because of the salesmen's "systematic and continuous" activities in Washington, the Court found that the jurisdictional requirements of due process had been met in rendering the out-of-state corporation accountable in Washington's courts. *Id.* at 320, 66 S. Ct. at 160, 90 L. Ed. at 104. In words now familiar, the Court noted that

> due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the

> territory of the forum, he have *certain minimum contacts* with it such that *the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."*
>
> [*Id.* at 316, 66 S. Ct. at 158, 90 L. Ed. at 102 (second and third emphases added) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)).]

In *McGee v. International Life Insurance Co.*, the Court held that a California state court properly exercised personal jurisdiction over a Texas life insurance company, which reneged on paying the beneficiary — a California resident — the proceeds of a policy on the death of the insured. 355 U.S. at 221-23, 78 S. Ct. at 200-201, 2 L. Ed. 2d at 224-26. Although the Texas company was not technically "present" in California, "[t]he [insurance] contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died." *Id.* at 222-23, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225-26. For due-process purposes, it was sufficient "that the suit was based on a contract which had [a] substantial connection with [California]." *Id.* at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226.

During the thirty-five years following *International Shoe*, a rapidly changing world economy required the United States Supreme Court to think anew about the limits of a state court's jurisdictional reach. In *World-*

Wide Volkswagen Corp. v. Woodson, the Court addressed for the first time whether an international manufacturer or distributor that places in the stream of commerce a purportedly defective product could be subject to the jurisdiction of a state where the product was purchased or accident occurred. 444 U.S. 286, 297-98, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501-02 (1980).

In that case, the Robinsons claimed that they were traveling through Oklahoma in their Audi when another vehicle struck their car in the rear, causing severe injuries due to a fire triggered by the "defective design and placement of the Audi's gas tank and fuel system." *Id.* at 288, 100 S. Ct. at 562, 62 L. Ed. 2d at 495. The Robinsons, who were residents of New York where the Audi was purchased, filed a product-liability action in Oklahoma. *Ibid.* The Court reaffirmed *International Shoe's* minimum-contacts test and pronounced that the Due Process Clause did not permit an Oklahoma court to exercise in personam jurisdiction over an Audi's retailer and wholesale distributor, both incorporated in New York, when their "only connection with Oklahoma [was] the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma."[8] *Id.* at 287-89, 299, 100 S. Ct. at 562-63, 568, 62 L. Ed. 2d at 495-96, 502.

8. In World-Wide Volkswagen, the manufacturer of the Audi automobile did not challenge jurisdiction in that product-liability case. 444 U.S. at 288 & n.3, 100 S. Ct. at 562-63 & n.3, 62

(Cont'd)

However, the Court posited a new theory of state-court jurisdiction the stream of commerce to respond to the contemporary realities of modern commerce. The Court stated that

> [w]hen a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a [foreign automobile] manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective

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L. Ed. 2d at 495-96 & n.3. Therefore, the Court addressed, exclusively, Oklahoma's assertion of jurisdiction over the automobile's regional distributor and retail dealer, not its foreign manufacturer. *Ibid.; see also Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 571 n.4 (Minn. 2004) ("While the example used by the Court [to illustrate the stream-of-commerce theory] dealt with jurisdiction over manufacturers and national distributors, the only parties contesting jurisdiction in *World-Wide Volkswagen* were the retail dealer and regional distributor.").

> merchandise has there been the source of injury to its owner or to others. *The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.*
>
> [*Id.* at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d at 501-02 (emphasis added) (citation omitted).]

That formulation of the stream-of-commerce theory did not afford jurisdiction to an Oklahoma court against the automobile's retailer and distributor. *Id.* at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502.

Interestingly, in his dissent, Justice Brennan observed that "[t]he model of society on which the International Shoe Court based its opinion is no longer accurate" given the increased mobility of people and products due to the advances in transportation and communication. *Id.* at 308-09, 100 S. Ct. at 568, 62 L. Ed. 2d at 508-09 (Brennan, J., dissenting). He did not believe that if "a State [gave] a nonresident defendant adequate notice and opportunity to defend, . . . the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial." *Id.* at 310-11, 100 S. Ct. at 568, 62 L. Ed. 2d at 510. Nevertheless, Justice Brennan would require the plaintiff to bear the burden of "demonstrat[ing] sufficient contacts among the parties, the forum, and

the litigation to make the forum a reasonable State in which to hold the trial." *Id.* at 312, 100 S. Ct. at 568, 62 L. Ed. 2d at 511.

In the wake of *World-Wide Volkswagen*, and in recognition of the complex international marketing schemes that bring products into our State, in *Charles Gendler & Co. v. Telecom Equipment Corp.*, we "adopt[ed] the stream-of-commerce theory as a basis for asserting personal jurisdiction over a non-resident defendant." 102 N.J. 460, 477, 508 A.2d 1127 (1986). In *Charles Gendler*, the defendant Japanese manufacturer opposed New Jersey's assertion of jurisdiction in a suit involving its sale of an allegedly defective telephone system through its New York subsidiaries to an independent New Jersey corporation, which then sold the defective product to the plaintiff, Charles Gendler & Co., Inc., a company with a business office in New Jersey. *Id.* at 467, 508 A.2d 1127.

In adopting the stream-of-commerce theory, we took into account the contemporary reality of how companies in foreign countries market their products in the United States. *See Id.* at 477-79, 508 A.2d 1127. We observed that for a foreign manufacturer, "the sale of its product in a distant state is not simply an isolated event, but the result of the corporation's efforts to cultivate the largest possible market for its product." *Id.* at 477-78, 508 A.2d 1127. We acknowledged that "[i]n today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States," but instead "employ middlemen, many of whom

are often independent, to act as their distribution arms." *Id.* at 479, 508 A.2d 1127. With that understanding, we rejected the notion that foreign manufacturers should "be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products." *Ibid.*

In *Charles Gendler*, in considering a state court's power to exercise in personam jurisdiction, we charted the contours of the stream-of-commerce theory. *See Id.* at 480-81, 508 A.2d 1127. First, "the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state." *Id.* at 480, 508 A.2d 1127. Second, "a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state." *Id.* at 481, 508 A.2d 1127. Thus, "[t]he focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products." *Ibid.* Third, "[a] manufacturer's awareness of the distribution system, through which it receives economic and legal benefits, justifies subjecting the manufacturer to the jurisdiction of every forum within its distributors' market area." *Ibid.* "Accordingly, a manufacturer that knows its products are distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and

that it will be subject to the jurisdiction of every state." *Ibid.* Last, a manufacturer that wishes to avoid the jurisdiction of a particular state must at least "attempt[] to preclude the distribution and sale of its products in [that] state." *Ibid.*

In light of that new pronouncement on the stream-of-commerce theory, we remanded for additional discovery relating to jurisdiction, with a specific focus on "whether [the foreign defendant] was aware or should have been aware of a system for distributing its telephones throughout the United States." *Id.* at 483, 508 A.2d 1127.

A year after *Charles Gendler*, the United States Supreme Court in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), elaborated on the stream-of-commerce theory in two competing four-member opinions. In that case, the plaintiff in a product-liability action sued the Taiwanese manufacturer of an allegedly defective motorcycle tire tube that exploded on a California roadway, causing an accident that severely injured the plaintiff-driver and killed his wife. *Id.* at 105-06, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100. The Taiwanese manufacturer, in turn, sought indemnification from its codefendant, Asahi Metal Industry Co., Ltd., the Japanese manufacturer of the tube's valve assembly. *Id.* at 106, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100-01. After the plaintiff's claims were settled and dismissed, the Taiwanese manufacturer's indemnification action against Asahi in California remained. *Id.* at 106, 107

S. Ct. at 1029, 94 L. Ed. 2d at 100. On one point all nine members of the Court agreed: the California state court could not, consistent with due process, exercise personal jurisdiction over Asahi in the indemnification action. *Id.* at 113-16, 107 S. Ct. at 1033-34, 94 L. Ed. 2d at 105-07.

In finding that the California court lacked personal jurisdiction, Justice O'Connor, writing for four members of the Court, construed the facts under a test that has become known as stream-of-commerce plus. *Id.* at 108-13, 107 S. Ct. at 1030-32, 94 L. Ed. 2d at 102-05 (plurality opinion). Under that test, the actions of a defendant must be "*purposefully directed toward the forum State*" for a court of that state to exercise personal jurisdiction. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. In Justice O'Connor's view, "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Ibid.* The stream-of-commerce plus test requires that the defendant engage in "[a]dditional conduct . . . indicat[ing] an intent or purpose to serve the market in the forum State." *Ibid.* That "additional conduct" could be "designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Ibid.* Justice O'Connor emphasized that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing

the product into the stream into an act purposefully directed toward the forum State." *Ibid.*

Within that framework, Justice O'Connor found that the Japanese corporation Asahi did not "purposefully avail itself of the California market" simply by selling component parts to a Taiwanese manufacturer, even if Asahi was aware that the completed product would be sold in California. *Id.* at 112, 114, 107 S. Ct. at 1032-33, 94 L. Ed. 2d at 104-06. Justice O'Connor reasoned that because Asahi had no offices or agents in California, did not advertise or solicit business in the state, and "did not create, control, or employ the distribution system that brought its valves" there, a California court could not exercise personal jurisdiction. *Id.* at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. Justice O'Connor concluded that there was a lack of "minimum contacts" with California and therefore "the exercise of personal jurisdiction is [not] consistent with fair play and substantial justice." *Id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Joined by three other members of the Court, Justice Brennan did not believe that Justice O'Connor's opinion kept faith with the stream-of-commerce theory enunciated in *World-Wide Volkswagen*. *Id.* at 116-21, 107 S. Ct. at 1034-37, 94 L. Ed. 2d at 107-10 (Brennan, J., concurring in part and concurring in judgment). To trigger a court's power to exercise personal jurisdiction under the stream-of-commerce doctrine, Justice Brennan saw no need for a plaintiff to present "additional conduct" to establish that the defendant's

acts were "purposefully directed toward the form State." *Id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted). According to Justice Brennan, "[t]he stream of commerce refers . . . to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107. Therefore, "[a]s long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Ibid.* Thus, the burden of litigation in the forum state is an economic expense related to the cost of doing business. *Id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107. Justice Brennan observed that the commercial benefits of selling a product in a state "accrue regardless of whether that participant directly conducts business in . . . or engages in additional conduct directed toward that State." *Id.* at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107. He noted that "most courts and commentators have found that jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause, and have not required a showing of additional conduct." *Id.* at 117, 107 S. Ct. at 1035, 94 L. Ed. 2d at 107-08.

Although Justice Brennan concluded that Asahi had the necessary minimum contacts with California, *Id.* at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110, he nevertheless agreed with Justice O'Connor that California's exercise of personal jurisdiction over Asahi would not comport with "fair play and substantial

justice,"[9] *Id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (citation and internal quotation marks omitted).

B.

After *Asahi*, some federal and state courts have applied Justice O'Connor's stream-of-commerce plus theory.[10] Other courts have taken Justice Brennan's

9. Justice Stevens, writing for himself and two other members of the Court, "[saw] no reason in this case for [Justice O'Connor's] plurality to articulate 'purposeful direction' or any other test as the nexus between an act of a defendant and the forum State that is necessary to establish minimum contacts." 480 U.S. at 122, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110 (Stevens, J., concurring in part and concurring in judgment). Accordingly, Justice O'Connor could not garner five votes for her stream-of-commerce plus test. Nevertheless, Justice Stevens also agreed that California did not have a basis to assert jurisdiction because the "minimum requirements inherent in the concept of fair play and substantial justice . . . defeat[ed] the reasonableness of jurisdiction." *Id.* at 121-22, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110 (citation and internal quotation marks omitted).

10. *See, e.g., Bridgeport Music, Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 479-80 (6th Cir.) (expressing "preference" for Justice O'Connor's approach and applying it to case), *cert. denied*, 540 U.S. 948, 124 S. Ct. 399, 157 L. Ed. 2d 279 (2003); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 944-46 (4th Cir. 1994) (taking approach similar to that of Justice O'Connor) *cert. denied*, 513 U.S. 1151, 115 S. Ct. 1103, 130 L. Ed. 2d 1070 (1995); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 681-83 (1st Cir. 1992) (same); *Madara v. Hall*, 916 F.2d 1510, 1519 (11th Cir 1990) (same); *Sorrells v. R & R Custom Coach Works*, 636 So. 2d

(Cont'd)

approach or have read *World-Wide Volkswagen* more expansively than Justice O'Connor's parsing of that opinion in Asahi.[11] Yet, others simply have declined to

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668, 674 (Miss. 1994) (applying Justice O'Connor's theory); Vt. *Wholesale Bldg. Prods. v. J.W. Jones Lumber Co.*, 154 N.H. 625, 914 A.2d 818, 826 (N.H. 2006) (declining "to adopt Justice Brennan's view," and "find[ing] Justice O'Connor's 'stream of commerce plus' theory more consistent with *World-Wide Volkswagen*").

11. *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 613-15 (8th Cir.) (taking broad approach to stream-of-commerce theory), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994); *Irving v. Owens-Corning Fiberglas Corp.*, 864 F.2d 383, 386 (5th Cir.) ("Because the Court's splintered view of minimum contacts in Asahi provides no clear guidance on this issue, we continue to gauge [the defendant's] contacts with Texas by the stream of commerce standard as described in *World-Wide Volkswagen* and embraced in this circuit."), *cert. denied*, 493 U.S. 823, 110 S. Ct. 83, 107 L. Ed. 2d 49 (1989); *State v. NV Sumatra Tobacco Trading, Co.*, 379 S.C. 81, 666 S.E.2d 218, 223 (S.C. 2008) (finding personal jurisdiction under broad stream-of-commerce theory where defendant's "actions indicate that it purposely availed itself of conducting business in all 50 states, including South Carolina"); *Hill v. Showa Denko, K.K.*, 188 W. Va. 654, 425 S.E.2d 609, 616 (W. Va. 1992) (noting that under stream-of-commerce theory, personal jurisdiction "can be exercised without the need to show additional conduct by the defendant aimed at the forum state"), *cert. denied*, 508 U.S. 908, 113 S. Ct. 2338, 124 L. Ed. 2d 249 (1993); *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, 245 Wis. 2d 396, 629 N.W.2d 662, 674 (Wis. 2001) ("We believe the stream of commerce theory as set forth by Justice Brennan is the correct analysis to apply to the case at hand."), *cert. denied*, 534 U.S. 1079, 122 S. Ct. 808, 151 L. Ed. 2d 694 (2002).

choose between the views of the two Justices instead applying both, with some directing their analyses to Justice O'Connor's more restrictive approach without explicitly rejecting Justice Brennan's approach.[12]

12. *See, e.g., Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999) (declining to "adopt either view of the 'stream of commerce' standard" because jurisdiction existed even under Justice O'Connor's "more restrictive view"); *Pennzoil Prods. Co. v. Colelli & Assocs.*, 149 F.3d 197, 205-07 (3d Cir. 1998) (taking approaches articulated by both Justices O'Connor and Brennan); *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1566 (Fed. Cir.) (same), *cert. dismissed*, 512 U.S. 1273, 115 S. Ct. 18, 129 L. Ed. 2d 917 (1994); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1547-48 (11th Cir.) (refusing to determine which approach controls because jurisdiction could be exercised even under Justice O'Connor's "more stringent 'stream of commerce plus' analysis"), *cert. denied*, 508 U.S. 907, 113 S. Ct. 2334, 124 L. Ed. 2d 246 (1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1359 (Ariz.) (refraining from "enter[ing] the debate between" *Asahi's* theories because "we decide this case under *Asahi's* more restrictive interpretation of due process"), *cert. denied*, 516 U.S. 906, 116 S. Ct. 273, 133 L. Ed. 2d 194 (1995); *Wiles v. Morita Iron Works Co.*, 125 Ill. 2d 144, 530 N.E.2d 1382, 1389, 125 Ill. Dec. 812 (Ill. 1988) ("We need not decide [between *Asahi's* theories] . . . for we believe that even under the broader version of the stream of commerce theory there were no minimum contacts . . . ."); *State v. Grand River Enters., Inc.*, 2008 SD 98, 757 N.W.2d 305, 314 (S.D. 2008) ("We do not reach the State's 'plus' argument because we conclude that the State failed to meet its burden of proof even under the more inclusive expectation standard in *World-Wide Volkswagen/Asahi*.").

Appendix A

In some cases, courts have dodged the stream-of-commerce conflict entirely by deciding a jurisdictional issue on firmer and more traditional grounds. For example, in *Lebel v. Everglades Marina, Inc.*, a contract dispute case involving a claim of fraud, we saw no need to decide whether the defendant Florida company, which sold a luxury racing boat to a New Jersey resident, was subject to the jurisdiction of a New Jersey court based on the stream-of-commerce theory. 115 N.J. 317, 319-20, 558 A.2d 1252 (1989) ("Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate."). Instead, we turned to the traditional *International Shoe* standard, finding that the defendant's actions met the minimum-contacts requirement and that the exercise of jurisdiction by New Jersey would not offend "'traditional notions of fair play and substantial justice.'" *Id.* at 321-29, 558 A.2d 1252 (quoting *Int'l Shoe Co.*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102).

Here, unlike in *Lebel*, we cannot evade consideration of the stream-of-commerce theory for it is the only basis on which the English manufacturer could be subject to the jurisdiction of a New Jersey court.

Appendix A

V.

New Jersey has a long-arm rule that permits service of process on a non-resident defendant "consistent with due process of law." R. 4:4-4(b)(1). Therefore, our State courts may exercise jurisdiction over a non-resident defendant "to the uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971). There is no question that the United States Supreme Court in *Asahi* embraced the stream-of-commerce theory in one form or another. In the twenty-two years since *Asahi*, transnational commerce has accelerated, and we realize more than ever that we live in a global marketplace. In light of *Asahi*, and given what we know of the modern economic world, we must decide whether the stream-of-commerce test that we set forth in *Charles Gendler* comports with the Due Process Clause of the Fourteenth Amendment.

A.

Today, we reaffirm the reasoning of our decision in *Charles Gendler*, and hold that a foreign manufacturer that places a defective product in the stream of commerce through a distribution scheme that targets a national market, which includes New Jersey, may be subject to the in personam jurisdiction of a New Jersey court in a product-liability action. All in all, *Charles Gendler*, in pronouncing when a State court can exercise personal jurisdiction over a defendant based on the stream-of-commerce doctrine, gave a faithful and fair

reading of World-Wide Volkswagen, one that is more reflective of Justice Brennan's views expressed in *Asahi*.

Notably, where a foreign manufacturer has sold its products through a nationwide distribution scheme, some courts including the Appellate Division in this case have construed Justice O'Connor's stream-of-commerce plus theory in *Asahi* in a way that is indistinguishable from *Charles Gendler* and the general language of *World-Wide Volkswagen*. *See, e.g., Tobin v. Astra Pharm. Prods., Inc.*, 993 F.2d 528, 543-45 (6th Cir.), *cert. denied*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993); *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1360-64 (Ariz.), *cert. denied*, 516 U.S. 906, 116 S. Ct. 273, 133 L. Ed. 2d 194 (1995); *Nicastro*, *supra*, 399 N.J. Super. at 557-560, 564-65.

Those courts did not believe that Justice O'Connor intended that a foreign manufacturer seeking to capture a national market through a nationwide distribution scheme would be immune from suit in every state. In the views of those courts, the additional conduct required by Justice O'Connor under her stream-of-commerce approach would be the targeting of the national market through, among other things, general sales solicitations orchestrated by a manufacturer's independent distributor. *See, e.g., Tobin*, *supra*, 993 F.2d at 543-45; *A. Uberti & C.*, *supra*, 892 P.2d at 1360-65; *Nicastro*, *supra*, 399 N.J. Super. at 557-560, 564-65. Thus, even under Justice O'Connor's approach, arguably, a manufacturer would be amenable to

jurisdiction in every state that is part of its national distribution scheme. *See, e.g., Tobin, supra*, 993 F.2d at 543-45 (permitting Kentucky to exercise personal jurisdiction over Netherlands drug manufacturer, which sought Federal Drug Administration approval for drug and, through American distributor, "made a deliberate decision to market [the drug] in all 50 states, including Kentucky"); *A. Uberti & C., supra*, 892 F.2d at 1360-65 (permitting Arizona to exercise personal jurisdiction over Italian firearms manufacturer, which sold revolvers intended for sale in United States through American distributor); *Nicastro, supra*, 399 N.J. Super. at 564, 945 A.2d 92 ("[D]efendant's conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey.").

Charles Gendler, although decided twenty-three years ago, speaks to the present realities of international trade and complex marketing techniques of transnational corporations that bring products, some dangerous and defective, into our State. In *Charles Gendler*, we recognized approaches concerning jurisdiction in stream-of-commerce cases that had long been in use in New Jersey courts. *See Charles Gendler, supra*, 102 N.J. at 476-77, 508 A.2d 1127 (citing *Coons v. Honda Motor Co., Ltd. of Japan*, 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980), *vacated and remanded*, 455 U.S. 996, 102 S. Ct. 1625, 71 L. Ed. 2d 857 (1982), *rev'd on other grounds*, 94 N.J. 307, 463 A.2d 921 (1983), *reh'g granted*, 95 N.J. 234, 470 A.2d 446, *modified*, 96

N.J. 419, 476 A.2d 763 (1984), *cert. denied*, 469 U.S. 1123, 105 S. Ct. 808, 83 L. Ed. 2d 800 (1985); *Certisimo v. Heidelberg Co.*, 122 N.J. Super. 1, 298 A.2d 298 (Law Div. 1972), *aff'd sub nom. Van Eeuwen v. Heidelberg E., Inc.*, 124 N.J. Super. 251, 306 A.2d 79 (App. Div. 1973)).

The preeminent issue is whether we will read the Due Process Clause in a way that renders a state, such as New Jersey, powerless to provide relief to a resident who suffers serious injuries from a product that was sold and marketed by a manufacturer, through an independent distributor, knowing that the final destination might be a New Jersey consumer.

A number of significant policy reasons animate the approach articulated in *Charles Gendler* the approach we follow today. A state has a strong interest in protecting its citizens from defective products, whether those products are toys that endanger children, tainted pharmaceutical drugs that harm patients, or workplace machinery that causes disabling injuries to employees. A state also has a paramount interest in ensuring a forum for its injured citizens who have suffered catastrophic injuries due to allegedly defective products in the workplace. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528, 541 (1985) ("A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (citation and internal quotation marks omitted)); *see also Charles Gendler*, *supra*, 102 N.J. at 483, 508

A.2d 1127 ("A state's interest in providing a forum for its residents is more compelling in a personal injury action than in commercial litigation.").

It would be strange indeed if a New Jersey manufacturer that makes a defective and dangerous product and is both subject to the jurisdiction of our courts and accountable under our product-liability laws would be able to move its plant to a foreign land and peddle its wares through an independent distributor across the nation, with some purchased by New Jersey consumers, and suddenly become beyond the reach of one of our injured citizens through this State's legal system. Our conception of jurisdiction must surely comport with traditional notions of fair play and substantial justice, but must also reflect modern truths the radical transformation of the international economy. Just as changing times led the United States Supreme Court to jettison "'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations," *McGee*, *supra*, 355 U.S. at 222, 78 S. Ct. at 200-01, 2 L. Ed. 2d at 225, so too must we discard outmoded constructs of jurisdiction in product-liability cases, and embrace a modality that will provide legal relief to our citizens harmed by the products of a foreign manufacturer that knows or should know, through the distribution scheme it employs, that its wares might find their way into our State.

In today's world, foreign manufacturers, plying overseas markets, should be covered by insurance,

accounting for the risks of doing business and providing a fund for consumers who may be injured by their products. *See World-Wide Volkswagen*, *supra*, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501. Defending a suit in one of the United States, moreover, is not as burdensome as it once might have been, given that air transport can bring the principals of a business here within hours and instantaneous communication allows an ongoing dialogue with counsel in this country. *See McGee*, *supra*, 355 U.S. at 223, 78 S. Ct. at 201, 2 L. Ed. 2d at 226. If it is not inconvenient for the principals of a company to attend trade conventions and conduct business meetings with an independent distributor in this country for the purpose of marketing its products, then it should not be too great a burden to defend a lawsuit here when one of its defective products causes serious bodily injury. Although we cannot control manufacturing plants leaving this country or control a foreign manufacturer's employment policy, working conditions, or the quality of its operations, we can ensure that a manufacturer that targets its defective products at a wide geographic market that includes New Jersey will not be immune from suit in our State's courts. A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State. *See Charles Gendler*, *supra*, 102 N.J. at 481, 508 A.2d 1127.

Appendix A

B.

Before addressing the facts in this case, we restate the governing stream-of-commerce principles in *Charles Gendler* that will apply in a product-liability case.[13] A foreign manufacturer will be subject to this State's jurisdiction if it knows or reasonably should know that through its distribution scheme its products are being sold in New Jersey. *Id.* at 480, 508 A.2d 1127. A manufacturer that knows or reasonably should know that its products are distributed through a nationwide distribution system that might lead to those products being sold in any of the fifty states must expect that it will be subject to this State's jurisdiction if one of its defective products is sold to a New Jersey consumer, causing injury. *Id.* at 480-81, 508 A.2d 1127. The focus is not on the manufacturer's control of the distribution scheme, but rather on the manufacturer's knowledge of the distribution scheme through which it is receiving economic benefits in each state where its products are sold. *Ibid.* A manufacturer cannot shield itself merely by employing an independent distributor a middleman knowing the predictable route the product

13. In this case, we address the stream-of-commerce doctrine in a product-liability action in which an allegedly defective machine severely injured a New Jersey resident. We do not discount that there may be cases in which a plaintiff's injury may be so minor that an assertion of jurisdiction by a New Jersey court would not comport with traditional notions of fair play and substantial justice. *See Charles Gendler, supra,* 102 N.J. at 482, 508 A.2d 1127 ("We recognize that the nature of the injury is relevant to the jurisdictional inquiry.").

will take to market. *Id.* at 479-80, 508 A.2d 1127. If a manufacturer does not want to subject itself to the jurisdiction of a New Jersey court while targeting the United States market, then it must take some reasonable step to prevent the distribution of its products in this State. *Id.* at 481, 508 A.2d 1126.[14]

C.

In light of those principles, we find that the record supports the exercise of jurisdiction over J. McIntyre under the stream-of-commerce doctrine. J. McIntyre, a company incorporated in the United Kingdom,

14. Given this detailed standard, taken from *Charles Gendler*, we are at a loss at how the dissent can claim that the majority has created "a new test that consists of but one inquiry: whether a product has found its way here." *Infra* at (slip op. dissent at 4). That mischaracterization is repeated in varying forms throughout the dissent. *See, e.g., infra* at (slip op. dissent at 17, 21-23, 27-29). It is the dissent's narrow parsing of *Charles Gendler*, not our copious quotations from and analysis of that opinion, which "has contorted the stream of commerce theory." *Infra* at (slip op. dissent at 22-23). The dissent turns a blind eye to the language in *Charles Gendler* that does not fit into its constricted view of jurisdiction. For example, the dissent tellingly omits that, under *Charles Gendler, supra*, a manufacturer with a "nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state." 102 N.J. at 481, 508 A.2d 1127. Ultimately, the dissent does not accept the basic teachings of *Charles Gendler* and would convert the "stream of commerce" doctrine into a dry bed.

targeted the United States market for the sale of its recycling products. It did so by engaging McIntyre America, an Ohio-based company, as its exclusive United States distributor for an approximately seven-year period ending in 2001. J. McIntyre knew or reasonably should have known that the distribution system extended to the entire United States, because its company officials, along with McIntyre America officials, attended scrap metal trade shows and conventions in various American cities where its products were advertised. Indeed, J. McIntyre's president was present at the Las Vegas trade convention where his exclusive distributor introduced plaintiff's employer to the allegedly defective McIntyre Model 640 Shear that severed four of plaintiff's fingers.

It is clear that those attending the scrap metal trade shows and conventions came from areas other than the cities hosting those events, and that the joint appearances by J. McIntyre and McIntyre America were calculated efforts to penetrate the overall American market. Plaintiff's employer, a New Jersey businessman, is just one example of a person who traveled thousands of miles to a convention where, by dint of a sales effort, he purchased one of J. McIntyre's machines. J. McIntyre may not have had access to McIntyre America's customer list, but J. McIntyre knew or reasonably should have known that its machines were being sold in states other than Ohio and in cities other than where the trade conventions were held. J. McIntyre may not have known the precise destination of a purchased machine, but it clearly knew or should

have known that the products were intended for sale and distribution to customers located anywhere in the United States.

J. McIntyre and McIntyre America shared a common name that may have suggested to unwitting members of the public some form of corporate relationship, despite the fact that both companies were independent business entities with different owners and management. The information sheet that accompanied the 640 Model Shear included J. McIntyre's address and telephone number and, according to the New Jersey businessman who purchased that machine, "had we needed any repair parts, we would have called J. McIntyre Machinery Ltd. in England, which is where we would call today for repairs or parts." There can be little doubt that J. McIntyre and McIntyre America worked together to promote and sell J. McIntyre products in the United States as evidenced by their shared communications and joint participation at industry trade conventions. It bears mentioning that J. McIntyre maintained ownership of at least some of its products delivered to McIntyre America until the distributor sold the products to a United States customer. Under that product-consignment relationship, McIntyre America would earn a commission from its sale of J. McIntyre's products after J. McIntyre collected its payment.

Because J. McIntyre knew or reasonably should have known that its distribution scheme would make its products available to New Jersey consumers, it now must

present a compelling case that defending a product-liability action in New Jersey would offend "'traditional notions of fair play and substantial justice.'" *Lebel, supra*, 115 N.J. at 328, 558 A.2d 1252 (citing *Burger King Corp., supra*, 471 U.S. at 477, 105 S. Ct. at 2184, 85 L. Ed. 2d at 544). However, J. McIntyre cannot make out a case that travel to New Jersey is onerous or an unfair burden for it to bear. J. McIntyre's officials have visited various cities throughout the United States to promote its business interests, attending trade conventions and meeting with representatives of its exclusive distributor. Certainly, defending the product-liability action in Ohio, where J. McIntyre's now-defunct exclusive distributor conducted business, or in Nevada, the site of the 1994 and 1995 trade conventions, would be no more convenient than in New Jersey. Indeed, New Jersey is a shorter distance from England than those locales, and neither the Ohio nor Nevada courts would seem to have an interest in resolving a product-liability action in which an English manufacturer's product injured a New Jersey resident in New Jersey.

On the other hand, New Jersey has a strong interest in exercising jurisdiction. Plaintiff is a New Jersey resident; the allegedly defective product was purchased by a New Jersey consumer, plaintiff's employer; the injury occurred in a New Jersey workplace; plaintiff was treated for his injuries in the New Jersey regional area; the evidence the shear machine and most of the necessary witnesses are located in New Jersey; and last, the law of this State likely will govern the action. It would be unreasonable to expect that plaintiff's only form of

relief is to be found in the courts of the United Kingdom, which may not have the same protections provided by this State's product-liability law. Under all the circumstances, New Jersey has a rightful claim to resolve the dispute between the parties and to assert jurisdiction over this product-liability action. We will not deny plaintiff a forum in the courts of this State.

VI.

The stream-of-commerce doctrine of jurisdiction is particularly suitable in product-liability actions. It will not necessarily be a substitute for other jurisdictional doctrines, i.e., minimum contacts, that will apply in contract and other types of cases. *See McKesson Corp. v. Hackensack Med. Imaging*, 197 N.J. 262, 266-67, 277-78, 962 A.2d 1076 (2009) (applying minimum-contacts test in holding that Texas court properly exercised personal jurisdiction over defendant New Jersey corporation that entered into commercial transactions with plaintiff-corporation in Texas). Within the confines of due process, jurisdictional doctrines must reflect the economic and social realities of the day. The exercise of jurisdiction by New Jersey in this case is a reasoned response to the globalization of commerce that permits foreign manufacturers to market their products through distribution systems that bring those products into this State. With the privilege of distributing products to consumers in our State comes the responsibility of answering in a New Jersey court if one of those consumers is injured by a defective product.

Appendix A

For the reasons expressed, we affirm the judgment of the Appellate Division, which reinstated plaintiff's product-liability action, and remand this matter to the trial court for proceedings consistent with this opinion.

CHIEF JUSTICE RABNER and JUSTICES LONG , LaVECCHIA , and WALLACE join in JUSTICE ALBIN's opinion. JUSTICE HOENS filed a separate, dissenting opinion, in which JUSTICE RIVERA-SOTO joins. JUSTICE RIVERA-SOTO filed a separate, dissenting opinion.

APPENDIX B DISSENTING OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY

A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v.

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

JUSTICE HOENS, dissenting.

I respectfully dissent. Quoting extensively from this Court's decision in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 508 A.2d 1127 (1986), the majority asserts, indeed insists, that it is merely reaffirming and applying the bedrock jurisdictional

principles this Court has long embraced. *Ante* at (slip op. at 33, 38-40). The majority purports as well to harmonize the *Gendler* holding with the analyses set forth in the competing plurality opinions of the United States Supreme Court, *see Asahi Metal Indus. Co., Ltd.*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). In fact, the majority's opinion does nothing of the sort.

Instead, in place of utilizing any of the analytical frameworks found in those three precedents, the majority has created an entirely new and unbounded test for asserting jurisdiction over foreign entities. Indeed, it is only by ignoring the essential underpinnings shared by those three opinions that the majority can reach its result; it is only by the use of subtle and unspoken shifts in language and emphasis that the majority is able to transform *Gendler* from what it is to what the majority chooses to have it mean. And transform it is precisely what the majority does. Because where *Gendler* used the stream of commerce theory as but one part of a larger due process analysis, with its traditional focus on the foreign defendant's connection to this forum, the majority has effectively substituted any effort by a manufacturer to sell its product anywhere in the nation as the only act needed for assertion of our jurisdiction.

Repeated quotations and soaring language about the realities of the global marketplace might compel the casual reader to follow what appears to be the majority's relentless logic. But those rhetorical techniques cannot mask the fact that the majority today embarks on a path

that stretches our notions about due process, and about what is fundamentally fair, beyond the breaking point. In doing so, the majority has, notwithstanding its protestations to the contrary, elected to forge a new and uncharted path. Because it is a path with which I cannot agree, I dissent.

I.

The issue presented to the Court in this dispute is a familiar one, for it requires us to decide whether our courts have jurisdiction over a foreign manufacturer of a product that is alleged to have injured one of our residents. At the same time, what might otherwise be an almost mundane exercise is complicated by the challenge of balancing the rights of the parties when the realities of a twenty-first century global economy strain against the outer limits of due process. In an effort to strike the right balance, we are asked to apply the stream of commerce theory, as articulated by this Court, *see Gendler*, *supra*, 102 N.J. at 480-81, 508 A.2d 1127; *cf. Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989) (declining to employ stream of commerce in place of traditional jurisdictional analysis), and as explained in the competing plurality opinions handed down by the United States Supreme Court, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion); *id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107-08 (Brennan, J., concurring). That theory, therefore, is at the heart of the debate in this appeal.

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In the majority's view, applying that theory demands that this foreign manufacturer be subject to the jurisdiction of our courts. Objectively analyzed, however, it is hardly that simple, because in its articulation of the stream of commerce theory, the majority has strayed far from the precedents it purports to apply. Starkly stated, the majority has abandoned the cautious wisdom of *Gendler* and *Asahi*, creating in their place a new test that consists of but one inquiry: whether a product has found its way here. In the majority's version of the stream of commerce theory, that fact alone suffices to subject the manufacturer of that product to our jurisdiction. But the majority's opinion fails to articulate an analysis consistent with any of the well-established tests that have discussed the stream of commerce theory and, in the process, departs radically from all of them. More to the point, the majority reaches its result only by disregarding carefully developed notions of due process to which non-resident defendants always have been entitled. I therefore respectfully dissent.

Three opinions, one in *Gendler* and the two plurality opinions in *Asahi*, stand at the core of the debate over jurisdiction in this appeal. Although each uses "stream of commerce" as its central theme, those decisions agree on neither the meaning nor the implications of that concept as it relates to the exercise of jurisdiction. Instead, each of those opinions considers the manufacturer's use of modern commercial distribution schemes, referred to as the stream of commerce, as but one part of a traditional jurisdictional inquiry. In doing

so, those opinions express diverse views that spring from different theoretical underpinnings, but none of them uses the stream of commerce concept as an independent source of jurisdiction; each considers it solely for the role it plays in the context of a due process analysis.

In reality, it is only by appreciating what each of those decisions actually understood the "stream of commerce" theory to mean that one can hope to apply any of those distinct theories about jurisdiction to this dispute. One cannot, as does the majority in this appeal, simply pluck out the words "stream of commerce" from those opinions and, repeating them like some ancient incantation, imply that it is a free-standing theory that supports the result the majority reaches. Nor can one use the phrase as if it were a short-hand substitute for a single analytical approach, so as to suggest that one has adhered to settled principles expressed in those three opinions. On the contrary, a careful explanation of the different versions of the stream of commerce theory set forth in those three opinions will best illustrate how the majority's approach has departed from, rather than adhered to, any of those precedents.

A.

This Court's prescient and groundbreaking opinion in *Gendler* is perhaps the best starting place, because it engaged in a thorough and scholarly analysis of the underlying problem of jurisdiction over foreign manufacturers that not only preceded the United States Supreme Court's effort to tackle the question, but that continues to serve us well today.

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As the *Gendler* Court recognized, all questions concerning a state's assertion of personal jurisdiction "must comport with the due-process requirement of the fourteenth amendment." *Gendler, supra*, 102 N.J. at 469, 508 A.2d 1127. Although we have long interpreted our long-arm jurisdiction to be consistent with "the uttermost limits permitted by the United States Constitution," *ibid.* (quoting *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971)), the fundamental and unquestioned right of a foreign defendant to due process remains the essential touchstone of jurisdiction.

In *Gendler*, the Court traced the origins of the stream of commerce theory through a review of the historical development of our theories of long-arm jurisdiction generally, beginning with the requirement of physical presence, *ibid.* (citing *Pennoyer v. Neff*, 5 Otto 714, 95 U.S. 714, 24 L. Ed. 565 (1878)), through the minimum contacts approach begun thereafter, *see ibid.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945)), to explain the framework within which a stream of commerce theory might apply. As part of that analysis, the Court pointed out that deciding whether it is fair to subject any defendant to suit in a particular forum has evolved to include concepts such as whether defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws," *id.* at 471, 508 A,2d 1127 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958)), and whether "defendant's contacts with the

forum state [are] such that it 'should reasonably anticipate being haled into court there.'" *Id.* at 470, 508 A.2d 1127 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490, 501 (1980)).

The Court in *Gendler* pointed out that the United States Supreme Court, in *World-Wide Volkswagen*, had recognized the vitality of a stream of commerce theory, but described that theory as having two component parts. Quoting the United States Supreme Court, this Court described the theory as permitting the exercise of jurisdiction over a non-resident manufacturer if that manufacturer first, places its products into the stream of commerce and, second, does so "with the expectation that they will be purchased by consumers in the forum State." *Id.* at 474, 508 A.2d 1127 (quoting *World-Wide Volkswagen*, *supra*, 444 U.S. at 298, 100 S. Ct. at 567, 62 L. Ed. 2d at 502). That second consideration, that is, the manufacturer's expectation, was related to the Court's reliance on a foreseeability analysis, and remains entirely consistent with the traditional inquiry about whether defendant could reasonably anticipate being "haled into court." *Id.* at 475, 508 A.2d 1127. Although this Court referred to the stream of commerce theory that had developed in the federal courts as "an independent basis to satisfy the minimum-contacts standard," *id.* at 476, 508 A.2d 1127 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473, 105 S. Ct. 2174, 2182, 85 L. Ed. 2d 528, 541 (1985)), its quotations from the United States Supreme Court's opinion in *Burger King* make plain that this Court recognized that stream

of commerce necessarily includes the element of expectation of purchase in this state. That is, by recognizing that there are two elements to the theory, this Court did not substitute mere usage of the stream of commerce as if it were a free-standing basis for jurisdiction, but instead included within it the fairness and foreseeability analyses that are essential to due process. *Ibid.*

Turning to an exhaustive analysis of both state and federal precedents in which the stream of commerce theory had been considered, this Court considered the exercise of jurisdiction over foreign manufacturers generally, finding that concepts such as the nature of the chosen chain of distribution, *see id.* at 477-78, 508 A.2d 1127, and evidence of a manufacturer's "purposeful penetration of the [forum state's] market," *id.* at 478, 508 A.2d 1127, were relevant to any consideration of the stream of commerce theory. In the end, however, the Court returned to fundamental concepts of due process, holding fast to considerations of purposeful availment, *ibid.*, reasonable expectations of being haled into court, *id.* at 475, 508 A.2d 1127, and receipt of benefits of the forum, *id.* at 480, 508 A.2d 1127, as the guiding principles of our jurisdictional analysis. This Court described with precision the test to be applied: "The crucial question is whether [the foreign manufacturer] was aware or should have been aware of a system of distribution that is *purposefully directed at New Jersey residents.*" *Gendler, supra*, 102 N.J. at 484, 508 A.2d 1127 (emphasis added).

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It is instructive to emphasize what *Gendler* did *not* decide. This Court did not conclude that the simple process of a product being placed into the general stream of commerce and ending up here was enough to support jurisdiction. Nor did this Court decide that creating a system of distribution that resulted in a product finding its way here was enough. Instead, this Court linked together two elements, awareness and purposefulness, that are critical, from the point of view of due process, to an exercise of jurisdiction. All of the comments in *Gendler* about the realities of a global economy and of nationwide patterns of distribution aside, this Court remained true to concepts long recognized to be the fundamental basis on which any state can exercise jurisdiction over a foreign entity.

B.

An analysis of the two competing plurality opinions of the United States Supreme Court in *Asahi*, *supra*, leads to a similar conclusion, that is, that in evaluating any state's exercise of long-arm jurisdiction, the Court's core concern is due process. On that point, both the plurality opinion authored by Justice O'Connor and the concurring opinion written by Justice Brennan agree. The basis for deciding all jurisdictional questions remains rooted in our traditional notions of due process, *see Asahi*, *supra*, 480 U.S. at 108-09, 107 S. Ct. at 1030, 94 L. Ed. 2d at 102 (O'Connor, J., plurality opinion); *id.* at 117, 107 S. Ct. at 1034-35, 94 L. Ed. 2d at 107-08 (Brennan, J., concurring), and must comport with "fair play and substantial justice," *see id.* at 113, 107 S. Ct. at

1033, 94 L. Ed. 2d at 105 (O'Connor, J., plurality opinion) (quoting *Int'l Shoe*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102); *id.* at 116, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring) (quoting *Int'l Shoe*, *supra*, 326 U.S. at 320, 66 S. Ct. at 160, 90 L. Ed. at 104).

Each of the plurality opinions uses the same test, namely, whether the foreign manufacturer has done something to "purposefully avail itself of the market in the forum State." *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103 (O'Connor, J., plurality opinion); *id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107 (Brennan, J., concurring). Each, significantly, makes clear that it is inappropriate to define the stream of commerce theory in such a way that the label takes the place of an evaluation of purposeful availment.

That is, Justice O'Connor, as part of considering the stream of commerce theory, framed the question in terms of whether it is consistent with the protections afforded by the Due Process Clause to assert jurisdiction over a defendant whose product was "swept" by the stream of commerce "into the forum State, but [where] the defendant did nothing else to purposefully avail itself of the market in the forum State." *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103. In her view, merely placing a product into the stream of commerce is insufficient to support jurisdiction because, without more, it cannot constitute action purposefully directed at the forum state. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. Although

reaching a different conclusion on what purposeful availment requires, Justice Brennan's opinion does not disagree with the notion that merely placing a product into the stream of commerce will not suffice. He explicitly pointed out that, in his understanding, "[t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Both of the plurality opinions in *Asahi*, therefore, caution against using "stream of commerce" as a surrogate for the analysis of the connection between the foreign entity and the forum that due process demands. The two opinions differ only in their definition of what, in addition to placing a product into the stream of commerce, will be required in order for the assertion of jurisdiction to pass constitutional muster.

For Justice O'Connor, the key lies in identifying sufficient additional conduct that would qualify to meet the test of purposeful availment. In her view, such conduct could be anything that would indicate that the foreign entity intended to serve a forum state's market, including: designing the product for the forum state's market; advertising there; establishing channels for providing regular advice to customers in the particular forum state; or marketing the product through a distributor that has agreed to serve as the sales agent in the forum state. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104.

Applying those concepts to the factual record before the Court in *Asahi*, Justice O'Connor concluded that the plaintiff's proofs fell short. She noted, for example, that the defendant did no business in the forum state, had no office, no agents, no employees and no property there. *Id.* at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. She observed that the defendant did not create, control or directly utilize the distribution system that brought its product to the forum state, because its product was merely a component of a vehicle being sold and distributed by others. *Ibid.* Moreover, she found in the record no evidence that the defendant had designed its product in anticipation of sales in the forum state. *Id.* at 113, 107 S. Ct. at 1032, 94 L. Ed. 2d at 105. Because the record lacked any evidence of conduct by the defendant that would tend to demonstrate that it had engaged in purposeful availment of the benefits of the forum, the opinion concluded that due process considerations would be offended by requiring it to appear and defend there.

More to the point, Justice O'Connor's plurality opinion in *Asahi* closely linked the assertion of jurisdiction over a defendant that has introduced a product into the stream of commerce to traditional notions of personal jurisdiction and the Due Process Clause, because jurisdiction rested on conduct of some variety or an intentional act directed at the forum. Far from simply relying on the act of introducing one's product into the stream of commerce, her opinion is rooted in the well-settled principle that jurisdiction must be based on some action or conduct that demonstrates

that the defendant has purposefully availed itself of the forum state's market.

Justice Brennan's concurring opinion in *Asahi* expressed a different view, but one that is equally grounded on ordinary concepts of due process and the extent to which that constitutional guarantee would be offended by the absence of a direct physical connection between the manufacturer's activities and the result of its product ending up in the forum state. He, too, considered the nature and extent of a manufacturer's activities that would suffice to satisfy the basic requirement that jurisdiction be supported by a defendant's purposeful availment of the forum state's market. *Id.* at 116-17, 107 S. Ct. 1034-35, 94 L. Ed. 2d at 107-08. He disagreed with Justice O'Connor's conclusion that affirmative conduct was needed, reasoning that due process notions of purposeful availment could be satisfied instead by evidence demonstrating that the manufacturer was aware of the fact that its product was being marketed in the forum state. *Id.* at 116-17, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107. Simple awareness of a remote possibility, however, is insufficient for jurisdiction as Justice Brennan understood it. Rather, in his words,

> [t]he stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the

> forum State, the possibility of a lawsuit there cannot come as a surprise.
>
> [*Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.]

Although Justice Brennan found it unnecessary for a plaintiff to show "additional conduct" directed toward the forum by a manufacturer, he defined the stream of commerce to include an affirmative awareness that the product, either separately or as a component part, is being marketed in the forum state. *Ibid.*

Justice Brennan commented that, as long as the manufacturer "is aware that the final product is being marketed in the forum," *ibid.*, there is a connection between the manufacturer and the forum sufficient for due process purposes. His opinion, therefore, did not substitute mere placement of a product into the stream of commerce for the ordinary requirements needed to satisfy due process. Nor did he embrace some metaphysical or theoretical definition of awareness. Instead, his opinion emphasized that there are two key indicia of "awareness" needed to support jurisdiction consistent with due process, namely, the regularity of the sales in or to the forum state and evidence of defendant's expectation that its product would be purchased there. *Id.* at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110.

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As part of his examination of the factual record in *Asahi*, Justice Brennan concluded that the evidence of regular and extensive sales of a product by the defendant to a manufacturer for incorporation as a component part, coupled with the defendant's knowledge that the manufacturer was engaged in the regular course of selling the final product in the forum state, was the crucial basis for the exercise of jurisdiction. He pointed out that the defendant's components were included in at least eighteen percent of the products sold in one forum state store and that the defendant, on average, annually sold hundreds of thousands of its components to the manufacturer. *See id.* at 121 n.4, 107 S. Ct. at 1037 n.4, 94 L. Ed. 2d at 110 n.4. Justice Brennan, therefore, found ample support for the "awareness" analysis embodied in his stream of commerce theory, leading to the conclusion that the defendant's due process rights would not be abridged by subjecting it to jurisdiction. *Id.* at 121, 107 S. Ct. at 1036 37, 94 L. Ed. 2d at 110.

II.

Neither of the *Asahi* opinions abandoned due process as the essential underpinning of jurisdiction, or reliance on purposeful availment as the core of that analysis. Neither of the *Asahi* opinions, moreover, equated merely placing a product into the stream of commerce somewhere in the United States with purposeful availment sufficient to comport with due process and to support jurisdiction. On the contrary, as those opinions and this Court's decision in *Gendler* make

clear, this Court and the United States Supreme Court have never strayed from the recognition that due process is fundamental to the constitutional assertion of jurisdiction over a non-resident defendant. This Court and the United States Supreme Court have never varied from holding that due process demands that there be some connection between a defendant and the forum, whether that analysis is expressed in terms of minimum contacts, *see Int'l Shoe*, *supra*, 326 U.S. at 316, 66 S. Ct. at 158, 90 L. Ed. at 102, or purposeful availment, *see Burger King*, *supra*, 471 U.S. at 475-76, 105 S. Ct. at 2183-84, 85 L. Ed. 2d at 542-43, or an action purposefully directed toward the forum State, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104 (O'Connor, J., plurality opinion), or awareness of regular and extensive sales of its product by another, *see Asahi*, *supra*, 480 U.S. at 121, 107 S. Ct. at 1036-37, 94 L. Ed. 2d at 110 (Brennan, J., concurring), or purposefulness demonstrated by the knowledge that one's products will be sold in the forum state, *see Gendler*, *supra*, 102 N.J. at 480, 508 A.2d 1127.

Today, in the guise of reaffirming *Gendler*, *ante* at (slip op. at 33), the majority cuts all ties with precedent and does what *Asahi* warned against, equating the mere placement of a product into the stream of commerce somewhere with whatever due process would otherwise demand for assertion of jurisdiction anywhere. The majority does so by first conceding that nothing in this record would satisfy the traditional minimum contacts test, *ante* at (slip op. at 15). It then describes the stream of commerce as if it were an alternative rationale,

ibid., proceeding thereafter to review the factual record in terms meant to match the ones used by this Court in *Gendler*.

As characterized by the majority, this case is about a foreign company that engaged in "purposeful marketing" of its product, *ante* at (slip op. at 2), that used a "distribution scheme," *ibid.*, and that "targeted" a geographical market that included New Jersey, *ante* at (slip op. at 2, 3, 33). There can be little debate, of course, that if defendant in fact had a "distribution scheme" like the ones considered in *Gendler* and *Asahi*, and if it "targeted" this state in particular, our traditional notions of due process would support the exercise of jurisdiction. This record, however, has evidence neither of a "distribution scheme" nor of "targeting" consistent with what this Court in *Gendler* or the United States Supreme Court in *Asahi* discussed. Indeed, it is only through subtle and unspoken, but analytically significant, shifts in the meaning of those phrases that the majority is able to assert that it is applying those precedents faithfully. It is, however, the very real distinctions between what the earlier opinions meant and what the majority today means that demonstrate that there is no faithful adherence to those precedents at all.

First, the "distribution scheme" in *Gendler* included a foreign manufacturer's creation of a wholly-owned subsidiary that was authorized to do business in this state, *Gendler*, *supra*, 102 N.J. at 467, 508 A.2d 1127, and that company's use of another wholly-owned

subsidiary that sold its products to a New Jersey corporation for eventual sale to plaintiff. *Ibid.* Moreover, the foreign corporation in *Gendler* conceded that the sale in New Jersey was "not an isolated transaction," *ibid.*, but was part of larger and "[d]eliberate sales efforts," *id.* at 469, 508 A.2d 1127, aimed at this state. Likewise, in *Asahi*, the foreign manufacturer's distribution system resulted in what Justice Brennan described as "regular and extensive sales" of its product for use as a component part in products sold in the state seeking to assert jurisdiction. *Asahi, supra*, 480 U.S. at 121, 107 S. Ct. at 1037, 94 L. Ed. 2d at 110.

Nothing in this record approaches the sort of "distribution scheme" to which those precedents referred. Instead, we are confronted with a foreign manufacturer that chose an entirely distinct, unaffiliated Ohio corporation to serve as its distributor, that had little, if any, success in its efforts to control or direct that entity's activities, that sent a representative to trade shows somewhere in this country from time to time, and whose independent distributor made but one sale of a machine that ended up in this state. Notwithstanding that record, through clever repetition of phrases like "distribution scheme," the majority transforms what might at most be described as a trickle of goods into a flood of products sufficient to meet the demands of due process when, in truth, the facts fall short. Apparently mindful of Justice Brennan's caution that we not equate stream of commerce with the "unpredictable currents and eddies, but to the regular and anticipated flow of its products," *see id.* at 117, 107

S. Ct. at 1034, 94 L. Ed. 2d at 107, the majority mischaracterizes the record to achieve precisely that end.

Second, the record is barren of the kind of targeting that this Court in *Gendler* and the United States Supreme Court in *Asahi* considered. In each of those opinions, the Courts evaluated the manufacturer's connection with the particular forum and utilized the stream of commerce to the extent that it played a role as the vehicle for getting the product to that forum. For example, in *Gendler*, one could conclude that there was an effort to access and exploit a market in New Jersey because the manufacturer utilized an alter ego, a wholly-owned subsidiary doing business here, and engaged in "[d]eliberate sales efforts" aimed at this state. *Gendler*, *supra*, 102 N.J. at 469, 508 A.2d 1127. In *Asahi*, although the record was hardly extensive, both of the opinions are clear about what is required, at a minimum, for this element of the test. For Justice O'Connor, it remains purposeful availment as evidenced through conduct aimed at a particular forum's market, *see Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104; for Justice Brennan, it requires affirmative awareness that the stream of commerce is being used to market the product in the target state, *id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

Nothing in this record rises to that level, for there is no evidence that the foreign corporation made any effort to send its products here; there is nothing more than a decision to market its product somewhere within

this nation. Ignoring this Court's plain command in *Gendler* that the "crucial question" includes a "system of distribution that is purposefully directed at New Jersey residents," *Gendler, supra*, 102 N.J. at 484, 508 A.2d 1127, the majority simply replaces targeting of this state, which would comport with due process, with a generic effort toward the whole of the United States, which does not.

The majority has, in reality, redefined the crucial jurisdictional terms to suit its ends. Affixing the wholly unwarranted label of "distribution scheme" now takes the place of explaining how the marketing efforts in this record rise to the level contemplated by that phrase in *Gendler* or *Asahi*. Redefining the target market from this forum to "a geographical market that includes New Jersey," *ante* at (slip op. at 3), masks the fact that there was no focus on this state. These are subtle shifts in emphasis indeed, but they are intentional ones, utilized to accomplish the majority's goal of transforming the due process requirement that there be a connection between the foreign entity and the forum state into a test in which the mere act of placing a product into the general stream of commerce somewhere in this nation will suffice. Justice O'Connor and Justice Brennan both rejected such a view, and the suggestion that somehow in *Gendler* this Court did otherwise is false.

Merely including extensive quotations from *Gendler*, and from the competing plurality opinions in *Asahi*, does not equate with analytical faithfulness to the principles on which those cases rest. Citing *Gendler's*

language about the global economy and about modern methods for distribution of allegedly dangerous products, as if those concerns alone support jurisdiction over a non-resident, misses the entire point of the *Gendler* analysis. Likewise, quoting from the opinions in *Asahi* without appreciating the fine distinctions about whether purposeful availment is tested by the additional conduct of the manufacturer, or by awareness of a regular and extensive distribution scheme, ignores the thorny constitutional questions those Courts, and this one, must confront fairly and squarely.

Instead of recognizing that in each of those opinions the stream of commerce is the beginning, and not the end, of the inquiry into jurisdiction, the majority has contorted the stream of commerce theory to its own ends. By ignoring the second half of the *Gendler* test, that is, the element of purposeful direction at New Jersey residents, *Gendler*, *supra*, 102 N.J. at 484, 508 A.2d 1127, the majority has transformed the analysis of the due process demands of jurisdiction into a single question: was a product introduced into the stream of commerce somewhere in the United States, eventually ending up here. That approach is not only circular and simplistic, it is, in the end, an unconstitutional one, because it is starkly inconsistent with fundamental notions of fairness and due process that this Court and the United States Supreme Court have identified as the touchstone of jurisdiction.

I part company with the majority's opinion because it fails to recognize that what gives content to the stream

of commerce theory is the manufacturer's conduct, or knowledge, or awareness of what others were doing with its product. It is those elements that satisfy the traditional component of purposeful availment and that, therefore, permit an exercise of jurisdiction that does not offend the outermost bounds of due process. Any jurisdictional inquiry must contend with the accepted two-part test, through which we recognize that due process demands some act, some evidence, some proof of affirmative awareness, that one's actions will likely result in a sale in the forum state. Because the majority has substituted any act, or potentially no act at all, that can be equated with permitting one's product to enter generally into the stream of commerce for that essential component of our due process analysis, I cannot agree.

III.

I part from my colleagues for a separate reason, albeit one that requires only a brief exposition. In *World-Wide Volkswagen*, the United States Supreme Court commented that part of deciding whether it is reasonable to require a nonresident corporation to defend itself in a particular forum includes an analysis of factors other than those that focus on defendant alone. The Court noted:

> [T]he burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute[,] . . . the plaintiff's

> interest in obtaining convenient and effective relief[,] . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies[,] and the shared interest of the several States in furthering fundamental substantive social policies[.]
>
> [*World-Wide Volkswagen, supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498 (citations omitted).]

Through this language, the Supreme Court made plain that the essential focus of the due process analysis must be on defendant and its relationship to the forum, and that the other considerations play a subsidiary role should the court conclude that there are sufficient contacts to support jurisdiction. In each of the decisions of that Court, the focus of the jurisdictional analysis is on defendant and its behavior or activities, rather than on plaintiff and his or her injuries or damages. The United States Supreme Court, although reciting facts relating to the damage or injury alleged, has done so in a cursory fashion, presumably to ensure that sympathy for an injured plaintiff would not shift the focus away from the due process rights of the nonresident defendant. *See, e.g., Asahi, supra*, 480 U.S. at 105, 107 S. Ct. at 1029, 94 L. Ed. 2d at 100 (noting that plaintiff was "severely injured"); *World-Wide Volkswagen, supra*, 444 U.S. at 288, 100 S. Ct. at 562, 62 L. Ed. 2d at 495 (noting that plaintiffs were "severely burned" when their car caught fire after accident with another vehicle).

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Apparently concluding that an appropriate evaluation of defendant's due process rights should instead be conducted only in the context of a full explanation of the factual assertions, the majority engages in an unnecessarily detailed description of plaintiff's severe injuries, coupled with repeated references to defendant's "dangerous" machine as the cause. That all of us desire to make certain that our citizens have access to our courts, that all of us agree that we should make a forum available so that injured individuals can achieve justice and fair compensation for their injuries caused by the negligence of others, is a given. But in this appeal, involving a dispute on a matter as to which the seriousness of the injury or the fault of the manufacturer is largely irrelevant, the majority's election to make such considerations so great a part of its reasoning suggests a disturbing shift in focus in two ways.

First, the majority rather inexplicably uses the fact of plaintiff's severe injuries to support its jurisdictional analysis, commenting that this newly adopted test applies in products liability cases, *ante* at (slip op. at 2), and observing that lesser injuries somehow might not be sufficient to support jurisdiction, *ante* at (slip op. at n.13). Apparently, the majority's stream of commerce approach would not, in these same factual circumstances, afford sufficient basis for us to grant the machine's corporate owner access to our courts if it sought to pursue a contract or warranty claim. Likewise, the usual focus on due process as it applies to a foreign defendant now turns in some never explained fashion

on whether the plaintiff includes the right sort of claim in the pleading and has injuries that the majority considers worthy of concern. In either case, those comments evidence a new, unexplained and unfounded approach to jurisdiction.

The majority therefore, sadly, creates a new rule only for the class of claims and claimants it favors, rather than one that applies to all like-situated matters and litigants. Indeed, the proof of that may be found in the supremely ironic fact that, on the same date on which we heard oral argument in this appeal, we issued our unanimous opinion in *McKesson Corp. v. Hackensack Medical Imaging*, 197 N.J. 262, 962 A.2d 1076 (2009). The Court there, using language that the majority today echoes, commented that "[i]n today's rapidly shrinking world, the purchase of goods from out-of-state vendors has become commonplace." *Id.* at 278, 962 A.2d 1076. Contrary to the majority's conclusion that for some plaintiffs, that fact alone supports the exercise of jurisdiction, this Court in *McKesson* utilized our traditional due process approach, cautioning that "[t]hose instances, standing alone, are insufficient to establish the requisite minimum contacts needed to invoke long-arm jurisdiction consistent with due process." *Ibid.*

Second, the majority opinion includes a change in focus from an appropriate analysis of a defendant's due process rights to concerns that plaintiffs be assured of access to the most convenient forum. Particularly troubling in this regard is the end of the opinion, in

which the majority appears to address two issues without benefit of briefing or argument. First, engaging in a discussion that should properly be characterized as a *forum non conveniens* analysis and, second, baldly asserting that our substantive law will apply, *ante* at (slip op. at 44), the majority seeks to add support for its conclusion that defendant should be forced to defend itself here. Whether a dispassionate *forum non conveniens* or choice of law analysis would yield that result is of no consequence; the inclusion of those points, as if the outcome is self-evident, betrays a majority that has lost sight of the fact that the focus of the analysis of due process and jurisdiction should be on defendant.

Because the majority opinion is pervaded by expressions of concern for plaintiff, his particular cause of action, the severity of his injuries and his interests, and because it has shifted from fairness to the nonresident defendant as the "primary concern," *see World-Wide Volkswagen*, *supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498, of a jurisdictional analysis, I respectfully dissent.

IV.

The version of the stream of commerce theory that the majority uses is a radical departure from the articulations of that theory as embraced by this Court in *Gendler*, and by the opinions of the United States Supreme Court in *Asahi*. It shatters the traditional, constitutionally-required ties between jurisdiction and connection with the forum, instead concluding that the

mere happenstance of a product finding its way here is sufficient indicia of foreseeability or availment or awareness which has long been the hallmark of due process. It avoids faithful application of the fundamental fairness concerns that have long guided this Court, and the United States Supreme Court, by relying on circular rhetoric about the global economy as if that alone comports with due process. In the end, the majority has replaced a carefully balanced test, albeit one with some slightly varying emphases, but that remained true to our notions of due process, with an unbounded one that presumes that participation in the global economy, without more, bespeaks purposeful availment of the benefits of this jurisdiction. I respectfully dissent.

JUSTICE RIVERA-SOTO joins in this opinion.

APPENDIX C DISSENTING OPINION OF THE SUPREME COURT OF NEW JERSEY DECIDED FEBRUARY 2, 2010

SUPREME COURT OF NEW JERSEY
A-29 September Term 2008

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Respondents,

v

MC INTYRE MACHINERY AMERICA, LTD.,

Defendant,

and

J. MC INTYRE MACHINERY LTD.,

Defendant-Appellant.

JUSTICE RIVERA-SOTO, dissenting.

In all respects, I wholeheartedly join in Justice Hoens's thoughtful, comprehensive and scholarly dissent. I write separately, however, solely to urge explicitly a point implied in Justice Hoens's dissent.

Appendix C

The majority's decision implicates and, in large and sweeping swaths, upends established notions of constitutional decision making that form the bedrock of our federal system. In so doing, it offends those core federalist concepts that rightly and prudentially limit the exercise of any one state's judicial power via the invocation of long-arm jurisprudence. It, therefore, cannot be allowed to stand. Because the majority "has decided an important federal question in a way that conflicts with" settled federal constitutional principles, Sup. Ct. R. 10(b), creates a new, insubstantial, and meaningless standard for the unbounded exercise of long-arm jurisdiction, and disturbs the careful balance that limits the exercise of judicial power between and among the several states, this decision is ripe for review and correction by the Supreme Court of the United States.

APPENDIX D OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED APRIL 9, 2008

SUPERIOR COURT OF NEW JERSEY,
APPELLATE DIVISION
DOCKET NO. A-1755-06T5

ROBERT NICASTRO and
ROSEANN NICASTRO, h/w,

Plaintiffs-Appellants

v.

McINTYRE MACHINERY AMERICA, LTD.,
J. McINTYRE MACHINERY LTD.,

Defendants-Respondents.

Argued October 3, 2007 – Decided April 9, 2008

LISA , J.A.D.

The issue in this case is whether New Jersey courts can assert long-arm jurisdiction over the British manufacturer of an industrial machine, which plaintiff alleges was defectively designed and caused him to be injured in a workplace accident in New Jersey. Plaintiff's employer purchased the machine new from the manufacturer's exclusive United States distributor, an Ohio corporation, after the employer attended a national trade convention in Las Vegas, Nevada and learned about the machine at a booth exhibit jointly operated

by the manufacturer and distributor. The manufacturer had no physical presence in New Jersey and asserted that it had no control over the activities of its United States distributor and had no knowledge of the domiciles of buyers to whom the distributor sold defendant's machines after defendant transferred title to the machines and shipped them to the distributor in Ohio. The trial court concluded that plaintiff failed to establish that defendant had sufficient minimum contacts with New Jersey to subject it to personal jurisdiction, and that even under the most liberal form of the stream-of-commerce theory, defendant would not be subject to personal jurisdiction in New Jersey.

We conclude that sufficient minimum contacts exist under the "stream-of-commerce plus" rationale espoused by Justice O'Connor in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032, 94 L. Ed. 2d 92, 104 (1987). We further conclude that entertainment of jurisdiction in New Jersey would not offend traditional notions of fair play and substantial justice. Accordingly, we reverse the order dismissing the complaint against the manufacturer for lack of personal jurisdiction.

J. McIntyre Machinery, Ltd. (defendant), a British corporation based in Nottingham, England, is in the business of manufacturing shearing machines used in scrap metal recycling operations. McIntyre Machinery America, Ltd. (McIntyre America), an Ohio corporation with its principal place of business in Stow, Ohio, was defendant's exclusive distributor in the United States

prior to going bankrupt in 2001. McIntyre America was not a subsidiary of defendant and there was no commonality of ownership or management of the two companies. They were independent corporate entities. There was apparently no written contract between the two companies, but the record reveals a close ongoing business relationship in which they cooperated in selling defendant's products to United States industrial customers.

Plaintiff, Robert Nicastro, a New Jersey resident, was employed by Curcio Scrap Metal in Saddle Brook. On October 11, 2001, plaintiffs hand became lodged in a shearing machine he was operating, causing him severe injuries. The machine was a Model 640 Shear manufactured in 1995 by defendant in England. The machine is about eight feet long and six feet high and weighs more than three tons.

In 1994 or 1995, Frank Curcio, the owner of Curcio Scrap Metal, attended the Institute of Scrap Recycling Industries (ISRI) convention in Las Vegas, Nevada. He visited an exhibitor's booth jointly operated by defendant and McIntyre America and obtained information about the Model 640, with which he was not previously familiar. Curcio learned that the machine was manufactured by defendant in England and distributed throughout the United States by its sole United States distributor, McIntyre America. Based upon that contact, Curcio ordered the machine.

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Defendant shipped the machine from England to McIntyre America in Ohio, which then shipped it to Curcio Scrap Metal in Saddle Brook. The purchase price was $ 24,900, as reflected in the August 25, 1995 invoice issued by McIntyre America to Curcio Scrap Metal. The invoice described McIntyre America as "America's Link to Quality Metal Processing Equipment."

The machine came with an instruction manual bearing on its cover defendant's name, with a sticker affixed containing McIntyre America's name. The manual advised that owners and operators must familiarize themselves and comply with specified safety standards issued in the United Kingdom and the United States, and set forth sources in both countries for applicable "working practices and regulations."

Defendant's president attended the ISRI conventions in Las Vegas in 1994 and 1995, which Frank Curcio attended. The president attended ISRI conventions each year from 1990 through 2002, held in various cities in the United States. Some years, he was accompanied by one or two other management level officers of defendant. Defendant's management level personnel also attended exhibitions, conferences and annual meetings of other United States trade organizations in the scrap metal industry.

Notwithstanding the apparent absence of a written contract, defendant does not dispute that McIntyre America was its sole United States distributor during the relevant time period. Evidence in the record

illuminates to some extent the nature of the relationship between the two companies regarding the sale of defendant's machines in the United States.

Defendant did not own property, maintain an office or bank account, or have employees in New Jersey. It was not licensed to do business in New Jersey and had no registered agent here. Its former managing director, Sally Johnson, certified that defendant "does not *directly* market, sell or solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. McIntyre does not, and never did, employ a sales staff in or for the United States." (emphasis added).

In a January 13, 1999 letter to McIntyre America, Johnson expressed concern over apparent disputes developing between the two companies and stated that she and "the Boss" would come to the United States to meet with McIntyre America's representatives within the next few days "to see how we can get things back on an even keel and move the businesses forwards [sic]." Johnson stated that defendant would arrange for collection of some of its unsold machines and equipment (other than Model 640s), "which should help to get your storage costs down." She then stated:

> I note also that you have 3 640s unsold which I understood to have been sent out against firm orders otherwise we wouldn't have built them! Perhaps we should also look at bringing a couple of those back also. It is important for us to try to turn some of your stock into cash

> as quickly as possible, since it is presently costing us £ 20,000 per year to fund it. If we can get the stock levels down, then we could look again at machine costings and perhaps in the short term try to send out fewer machines but give you more margin on them.

In a November 23, 1999 communication from defendant's president to McIntyre America, it is evident that the difficulties between the two companies continued. He stated:

> As you know, we are unhappy with the present situation. All we wish to do is sell our products in the States and get paid! If this isn't possible then the only other option open to us is for us to split up in an amicable fashion as quickly as we can. I note that you still have new machines in stock, which you are presently unable to sell. Please note that those machines are our property until they have been paid for in full.

During the interim period, on April 23, 1999, McIntyre America communicated with Johnson, referencing "what we discussed at ISRI" regarding "commissions." Apparently, McIntyre America took a "commission" on a sale before defendant was "paid by the customer for it." McIntyre America assured defendant that "[w]e do not plan to collect our commissions in this fashion on an ongoing basis," but

explained that it was in a tight cash flow position at that time. McIntyre America assured defendant:

> We have no problem waiting for you to receive payment from the customer first before requesting our commission via a comp[an]y invoice in the future. It was not our intention to upset you or your books over in England with our actions. That's why I paid you for the 407 shear, that we just got payment for by check, even though it has not even had time to clear our bank! We have all worked very hard to build up confidence in each other and we have no desire to jeopardize those strides. I have faxed over an invoice for the commission today, and I will send you out a hard copy in the mail.

These communications support the reasonable inference that defendant retained a significant measure of control over the level of McIntyre America's inventory of defendant's machines, which remained defendant's property until McIntyre America sold them to United States customers. It is also reasonable to infer that defendant dictated the "margin" or "commission" McIntyre America would receive when a sale was accomplished. It is thus evident that the two companies were acting closely in concert with each other to sell defendant's machines to customers throughout the United States, through a distribution system in which McIntyre America was a conduit for the sales.

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Although our minimum contacts analysis focuses on the time-frame leading up to the sale of the product, we consider subsequent conduct by defendant for the limited purpose of supporting reasonable inferences that relate back to its conduct at the critical time. In addition to that which we have already described regarding direct dealings between defendant and McIntyre America, other uncontroverted conduct and statements by defendant demonstrate its continuing course of conduct with successors to McIntyre America, as defendant's exclusive distributors, and defendant's continuing activities directed at selling its products to United States customers through these exclusive distributors.

An article in a trade publication, Recycling Today, in May 2002, announced that defendant appointed Recycling Equipment Corp. (REC), of Pennsylvania, as its "exclusive North American distributor." The article described the first United States sale of a particular shear machine model to a Tennessee purchaser, and elaborated: "The machine was exhibited at the recent ISRI convention in Las Vegas, and was purchased from the J. McIntyre Machinery Ltd. booth." Information in the article was attributed to Sally Johnson. The article stated: "Although McIntyre shears are well established in America, this is the first shipment to the U.S. in more than 18 months, following the demise of J. McIntyre Machinery Ltd.'s former distributor, McIntyre America." Then, Johnson was quoted as saying, "We had a fantastic ISRI show with our new distributor REC. . . . We received strong inquiries, and it is actually some

years since we sold a shear off the stand at an American exhibition."

REC was then replaced by Strip Technology, Inc. (Strip-Tec), of Texas, as defendant's exclusive United States distributor. In October 2003, this article appeared in Recycling Today:

> Strip Technology Inc. (Strip-Tec), Fort Worth, Texas, has recently ordered its second container load of alligator shears manufactured by J. McIntyre Machinery Ltd., Dunkirk, U.K.
>
> "Since having been appointed sole agents for the McIntyre shear range only six months ago, Strip-Tec has placed an order for its second container of equipment," a news release from the British equipment maker states.
>
> Strip-Tec president Bobby Alexander says his company is carrying J. McIntyre shears in stock at the company's facility in Fort Worth while also holding a spare parts inventory to offer "excellent back-up support for the McIntyre shear range."
>
> Sally Johnson, J. McIntyre's managing director, has also advised North American buyers to deal only with Strip Tec for the purchase of new J. McIntyre shears.

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"J. McIntyre Machinery is keen to stress that Strip Tec is now the only company authorized to sell new McIntyre equipment following the demise of our former agent McIntyre America in 2001," says Johnson, referring to a former Ohio-based distributor.

Johnson has asked recyclers who learn of any North American companies offering new McIntyre shears other than Strip Tec "or its appointed representatives" to contact Strip Tec in the U.S. at (800) 426-4126 or J. McIntyre Machinery Ltd in the U.K. at &8F44 115-900-3650. "These machines may not have been authorized for sale by the manufacturer, and as such may be being sold illegally and without the latest operating instructions, warning labels and operator guarding," Johnson says of equipment offered in North America by someone other than Strip Tec.

Johnson also says any McIntyre customers who purchased their machines from the prior distributor "are encouraged to register their equipment with Strip-Tec in order to receive information on latest equipment updates and allow McIntyre and Strip-Tec to offer full support and competitive pricing on genuine McIntyre spare parts."

Curcio does not contend that it utilized the trade publication articles as sources of information for the

machine it purchased. And, of course, we realize that the articles we have quoted did not involve McIntyre America, but its successors. Nevertheless, the evidence supports defendant's continuing outreach for United States sales of its machines and parts through its exclusive United States distributor and no one else. The articles specifically mention McIntyre America. It is reasonable to infer that the arrangements were similar during McIntyre America's tenure as defendant's exclusive United States distributor.

The trial court found that defendant "does not have a single contact with New Jersey short of the machine in question ending up in this state." The court deemed it critical that the manufacturer and distributor were "entirely separate business entit[ies]." Apparently accepting the statement in Johnson's certification that defendant "had no knowledge of the business dealings between [McIntyre America] and its customers, including Curcio, concerning the at-issue shear," the court found "no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey." The court therefore concluded that no basis for personal jurisdiction was established, either under the traditional minimum contacts test or the stream-of-commerce theory.[1]

1. The order dismissing the complaint now under review was entered on November 3, 2006. A prior order, entered on March 5, 2004, dismissed the complaint for lack of personal

(Cont'd)

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New Jersey's equivalent of a long-arm statute, *Rule* 4:4-4(b)(1), permits service of process on a non-resident defendant "consistent with due process of law." Accordingly, New Jersey courts have allowed out-of-state service to the outermost limits permitted by the United States Constitution. *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971).

Due process requires that a defendant who is not physically present have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 236 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)). "Minimum contacts" is understood to require that a defendant has "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958). The purpose of the minimum contacts doctrine is to protect a defendant against litigating in an inconvenient forum and to ensure that states do not exceed their jurisdictional limits.

(Cont'd)

jurisdiction. Plaintiffs appealed and we reversed and remanded to allow jurisdictional discovery. *Nicastro v. McIntyre Mach. Am., Ltd.*, No. A-3891-03T1 (App.Div. May 26, 2005). After that discovery was conducted, defendant again moved for dismissal, which was granted by the November 3, 2006 order.

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World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 100 S. Ct. 559, 564, 62 L. Ed. 2d 490, 498 (1980). The doctrine has been relaxed substantially over the years because of the fundamental transformation in the American economy, commonly involving interstate business transactions without physical presence. *Id.* at 292-93, 100 S. Ct. at 565, 62 L. Ed. 2d at 498.

The due process analysis requires consideration of whether the defendant should reasonably anticipate being haled into court in the forum state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S. Ct. 2174, 2183, 85 L. Ed. 2d 528, 542 (1985). It must be shown that the defendant has purposefully availed itself of the privilege of engaging in activities within the forum state, thus gaining the benefits and protections of its laws. *Id.* at 475, 105 S. Ct. at 2183, 85 L. Ed. 2d at 542. The purposeful availment requirement protects defendants against being haled into court in a foreign jurisdiction solely on the basis of random, fortuitous, or attenuated contacts, or as a result of the unilateral activity of some other party. *Ibid.*

If a plaintiff succeeds in establishing sufficient minimum contacts, the court must also determine whether entertaining jurisdiction would be consistent with considerations of fair play and substantial justice. *Id.* at 476, 105 S. Ct. at 2184, 85 L. Ed. 2d at 543; *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322, 558 A.2d 1252 (1989).

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More than fifty years ago, the United States Supreme Court recognized that the minimum contacts basis as an alternative to the requirement of physical presence for the assertion of *in personam* jurisdiction was justified by the "increasing nationalization of commerce," in which many business transactions were conducted across state lines, and the corresponding improvements in modern transportation and communication that made it less burdensome for a party sued to defend himself in a state where he engages in economic activity. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23, 78 S. Ct. 199, 201, 2 L. Ed. 2d 223, 226 (1957). In *World-Wide Volkswagen*, *supra* the Court observed that these "historical developments . . . have only accelerated in the generation since /*McGee*/ was decided." 444 U.S. at 293, 100 S. Ct. at 565, 62 L. Ed. 2d at 498-99.

Another generation has now passed since *World-Wide Volkswagen* was decided in 1980, and "the acceleration in the internationalization of commerce is apparent." *Barone v. Rich Bros. Interstate Display Fireworks Co.*, 25 F.3d 610, 615 (8th Cir.), *cert. denied*, 513 U.S. 948, 115 S. Ct. 359, 130 L. Ed. 2d 313 (1994). With increased globalization of commerce, "it is only reasonable for companies that distribute allegedly defective products through regional distributors in this country to anticipate being haled into court by plaintiffs in their home states." *Ibid.* At the same time, however, a countervailing policy consideration cautions that particularly careful inquiry must be made into the reasonableness of the assertion of jurisdiction over an

alien defendant, and courts should be unwilling to find the serious burdens on an alien defendant of having to litigate in a foreign country outweighed by only minimal interest on the part of a plaintiff or the forum state. *Asahi, supra*, 480 U.S. at 115, 107 S. Ct. at 1034, 94 L. Ed. 2d at 106-07.

In the minimum-contacts analysis, courts distinguish between specific and general jurisdiction. *Wilson v. Paradise Vill. Beach Resort & Spa*, 395 N.J. Super. 520, 527, 929 A.2d 1122 (App.Div.2007). "Although the minimum-contacts test centers on the defendant's relationship with the forum state, the sufficiency of the contacts for jurisdictional purposes depends on 'the relationship among the defendant, the forum, and the litigation * * *.'" *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.*, 102 N.J. 460, 471, 508 A.2d 1127 (1986) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 2580, 53 L. Ed. 2d 683, 698 (1977)). When the cause of action is unrelated to the defendant's contacts with the forum state, the court's jurisdiction is general, and continuous and substantial contacts are required. *Id.* at 471-72, 508 A.2d 1127. However, when the cause of action arises directly out of the defendant's contact with the forum state, the court's jurisdiction is specific, and an isolated act by the defendant may be sufficient to support jurisdiction over that defendant. *Id.* at 471, 508 A.2d 1127. Jurisdiction is more likely to be found when the cause of action arises directly out of the defendant's contacts with the forum state. *Ibid.* Because plaintiffs cause of action arises directly out of the sale to a New Jersey purchaser for use in New Jersey of the

shear machine that allegedly caused plaintiff's injury, this is a case of specific jurisdiction.

In *World-Wide Volkswagen*, *supra* the United States Supreme Court adopted the stream-of-commerce theory as a basis for establishing minimum contacts, 444 U.S. at 297-98, 100 S. Ct. at 567, 62 L. Ed. 2d at 501-02, and the Court reiterated its commitment to the theory in *Burger King*, *supra*, 471 U.S. at 473, 105 S. Ct. at 2182, 85 L. Ed. 2d at 541. In 1986, in *Charles Gendler*, *supra* the New Jersey Supreme Court adopted the stream-of-commerce theory, and explained it this way:

> In *World-Wide Volkswagen*, the Supreme Court noted that the stream-of-commerce theory would apply to subject foreign manufacturers and major distributors, but not local retailers or distributors, to jurisdiction in the states where their products were eventually shipped and sold. The foreseeable market served by local retailers and distributors, which are at the end of the distribution chain, is constrained. In contrast, manufacturers and distributors, which are at the start of a distribution chain, serve a larger market and purposely conduct their activities to make their product available for purchase in as many forums as possible. For such a manufacturer, the sale of its product in a distant state is not simply an isolated event, but the result of the corporation's efforts to cultivate the largest possible market for its

product. Because the manufacturer and primary distributor intend to serve and derive benefits from a larger market, it is fair to subject them to jurisdiction, while excusing a secondary distributor or retailer.

As observed in several cases, foreign manufacturers derive benefits from the indirect sale of their products throughout the United States. By increasing the distribution of its products, the manufacturer not only benefits economically from indirect sales to forum residents, but also benefits from the protection provided by the laws of the forum state. Thus, a manufacturer that distributes its products into the stream of commerce for widespread distribution derives both legal and economic benefits from the states in which its products are sold. In sum, the system through which the manufacturer distributes its products evidences the manufacturer's purposeful penetration of the market.

A foreign manufacturer that purposefully avails itself of those benefits should be subject to personal jurisdiction, even though its products are distributed by independent companies or by an independent, but wholly-owned, subsidiary. In today's complex business world, foreign manufacturers rarely deliver products directly to consumers in the United States. Instead, these manufacturers

employ middlemen, many of whom are often independent, to act as their distribution arms. To allow a foreign manufacturer to shield itself from liability for damages caused by its products distributed by those middlemen would be to permit a legal technicality to subvert justice and economic reality in the worst sense. Foreign manufacturers should not be allowed to insulate themselves by using intermediaries in a chain of distribution or by professing ignorance of the ultimate destination of their products. Thus, the stream-of-commerce theory supports personal jurisdiction over foreign manufacturers that derive benefits from the distribution and sale of their products in the United States.

As applied to a manufacturer, the stream-of-commerce theory supports the exercise of jurisdiction if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold in the forum state. The manufacturer's awareness of the distribution system satisfies the requirement that the manufacturer have a reasonable expectation that its products will be purchased in the forum state. It makes no difference whether the manufacturer had actual or constructive knowledge of the distribution system. A manufacturer that should have known, like one that actually

knows, that its products will be sold in the forum state purposefully avails itself of the benefits of the forum's laws.

By definition, a stream-of-commerce case involves a sale not by the manufacturer, but by another entity in the chain of distribution. To be subject to the stream-of-commerce theory in some jurisdictions, the manufacturer must purposefully participate in or control the distribution of its products. We believe, however, that a manufacturer need not so control the distribution system to place its products into the stream of commerce and, therefore, control of that system is not necessary to subject the manufacturer to the jurisdiction of the forum state. The focus is on the manufacturer's actual or constructive awareness of the system, not on control of the distribution of its products. A manufacturer's establishment or control of a distribution system, of course, satisfies the requirement that the manufacturer was aware of that distribution system.

A manufacturer's awareness of the distribution system, through which it receives economic and legal benefits, justifies subjecting the manufacturer to the jurisdiction of every forum within its distributors' market area. Accordingly, a manufacturer that knows its products are

> distributed through a nationwide distribution system should reasonably expect that those products would be sold throughout the fifty states and that it will be subject to the jurisdiction of every state.
>
> [102 N.J. at 477-481, 508 A.2d 1127 (citations and quotation marks omitted).]

Less than a year after our Supreme Court decided *Charles Gendler*, the United States Supreme Court decided *Asahi*, in which it sought to refine the boundaries of the stream-of-commerce theory. The Court split four-four-one. Writing for four members of the Court, Justice O'Connor espoused the view that the stream-of-commerce theory required a showing of an action of the defendant purposefully directed toward the forum state, and that the placement of a product into the stream of commerce, without more, would not fulfill that requirement. *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104. In her view, "[a]dditional conduct of the defendant may indicate an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Ibid.* However, mere awareness that the stream of commerce might sweep the product into the forum state would not convert the mere act of placing the product into the stream of

commerce into an act purposefully directed toward the forum state. *Ibid.* Justice O'Connor pointed out that although the foreign manufacturer in *Asahi* might have been aware that some of its component products would be incorporated into other products ultimately sold in California, the manufacturer "did not create, control, or employ the distribution system that brought its valves to California," *id.* at 112-13, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104-05, suggesting that the result might have been different if one of those circumstances were present.

Justice Brennan, writing for four members of the Court, rejected Justice O'Connor's "additional conduct" requirement. *Id.* at 116-21, 107 S. Ct. at 1034-37, 94 L. Ed. 2d at 107-10. In his view, the purposeful availment requirement is satisfied by placement of a product in the stream of commerce with an awareness that the final product is being marketed in the forum state, because, by definition, the stream-of-commerce "refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacturer to distributor to retail sale." *Id.* at 117, 107 S. Ct. at 1034, 94 L. Ed. 2d at 107.

The New Jersey Supreme Court next had the occasion to consider the stream-of-commerce theory in *Lebel*, *supra* in which it announced that until the United States Supreme Court, "as the umpire of federalism," more clearly "draws the lines" defining the theory, the New Jersey Supreme Court would "hew closely to the limited fundamentals about which there is little or no dispute or debate." 115 N.J. at 319-20, 558 A.2d 1252.

The Court proceeded to decide the case, finding jurisdiction based on traditional minimum contacts principles. *Id.* at 321-29, 558 A.2d 1252.

This court has interpreted our Supreme Court's announcement in *Lebel* as not a rejection of the stream-of-commerce theory, but an admonition to avoid use of the theory as the basis for a jurisdictional decision if jurisdiction can be sustained on traditional minimum-contacts analysis. *Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66, 72, 600 A.2d 1238 (App.Div.), *certif. denied*, 130 N.J. 9, 611 A.2d 648 (1992). Judge Pressler there analyzed the disposition in *Asahi*, and pointed out that all nine Justices agreed that because the injured plaintiff's claim against all defendants was settled, and all that remained to the litigation was an indemnification claim between two alien corporations, California's exercise of jurisdiction for the sole purpose of adjudicating that claim would offend traditional notions of fair play and substantial justice. *Id.* at 70-71, 600 A.2d 1238. The entire Court agreed that California's minimal interest in the remaining aspect of the dispute was outweighed by the undue litigative burden that would be placed on an alien corporation if compelled to resolve the dispute in a California court. *Id.* at 71, 600 A.2d 1238. As a result, the disagreement between the Justices regarding the precise parameters of the stream-of-commerce theory was somewhat minimized. *Ibid.*

The Eighth Circuit, based upon a similar analysis, concluded that, "*Asahi* [ ] stands for no more than that it is unreasonable to adjudicate third-party litigation

between two foreign companies in this country absent consent by the nonresident defendant." *Barone, supra*, 25 F.3d at 614. The court noted, "'Because the [United States] Supreme Court established the stream of commerce theory, and a majority of the court has not yet rejected it, we consider that theory to be determinative.'" *Ibid.* (quoting *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946 (7th Cir.1992)).

We agree that the stream-of-commerce theory remains viable, and note that it "has achieved fairly wide acceptance in the federal courts." *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed.Cir.1994). We are unable in this case to conclude that application of traditional minimum contacts principles will result in a finding of jurisdiction. Accordingly, because we are convinced that the stream-of-commerce theory remains viable, we apply it.

While some courts have utilized Justice Brennan's pure stream-of-commerce rationale, we find it unnecessary to do so in this case. Instead, we follow those courts that have taken the more cautious approach by applying Justice O'Connor's more restrictive rationale, which has come to be known as "stream-of-commerce plus." *See* 16 James W. Moore et al., *Moore's Federal Practice* Civil § 108.42 nn. 35 & 36 (3d ed. 2008)(discussing *post-Asahi* federal cases adopting Justice O'Connor's "stream-of-commerce plus" rationale as compared to federal cases adopting Justice Brennan's traditional stream-of-commerce theory). The more restrictive approach, of course, encompasses the less restrictive one.

Therefore, in order to determine whether New Jersey courts have personal jurisdiction over defendant, we must evaluate whether defendant, in addition to placing the shear machine that injured plaintiff into the stream of commerce by transferring it to its distributor, McIntyre America, with an awareness that its machine might end up in New Jersey, also engaged in additional conduct indicating an intent or purpose to serve the New Jersey market. *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104.

Defendant designated McIntyre America as its exclusive distributor for the entire United States. Therefore, anyone in any state that wished to purchase one of defendant's machines was required to purchase it from McIntyre America, defendant's exclusive sales agent in this country. This was not a temporary or fleeting arrangement. From at least as early as 1995, when Curcio purchased the machine, until its bankruptcy in 2001, McIntyre America enjoyed this relationship with defendant on an ongoing basis. The relationship was established by defendant for the purpose of selling its machines in all fifty states. The machines were designed to conform with United States standards as well as those in the United Kingdom. McIntyre America traded on defendant's name and held itself out as "America's Link to Quality Metal Processing Equipment."

Defendant attempts to avoid a finding of sufficient minimum contacts because (1) McIntyre America was a separate and independent business entity, (2) McIntyre

America, not defendant, sold the machines to customers (including Curcio), and (3) defendant had no knowledge of the identity or whereabouts of the customers to whom McIntyre America sold. We reject defendant's arguments.

Defendant was well aware that McIntyre America was not the end user of the many machines it sold to McIntyre America over the years. By definition, McIntyre America was defendant's distributor and its function was to resell the machines to end users. These are large, potentially dangerous, industrial machines, designed for a limited market of users engaged in the metal recycling industry. The machines are designed for use in a stationary location in an industrial setting. Thus, it would reasonably be anticipated by defendant and McIntyre America that upon sale to the end user, the machine would remain at its location for use by workers there.

When defendant sold and shipped machines to McIntyre America in Ohio, defendant did not do so with the purpose of availing itself of the Ohio market. When defendant's senior management personnel attended trade conventions in Las Vegas and other United States cities to display its machines and seek buyers for them (through McIntyre America), its purpose was not to sell machines for use in Las Vegas or those other cities. Defendant was engaged in purposeful conduct to avail itself of the entire United States market, namely to effect sales, through its exclusive distributor, to end users in all fifty states, including New Jersey.

Appendix D

The sale of the machine to Curcio was not the result of conduct by a party unrelated to defendant and it was not an isolated transaction. It was the result of the very distribution scheme purposefully established by defendant for the sale of its machines to potential customers located anywhere within the exclusive sales territory of McIntyre America. That territory included New Jersey.

Applying Justice O'Connor's stream-of-commerce formulation in similar situations, courts have held that sales by distributors to customers within their distribution territory, pursuant to distribution arrangements established by the manufacturer, exposed the manufacturer to specific *in personam* jurisdiction for claims arising out of those sales. This is the very type of "additional conduct" Justice O'Connor suggested as sufficient to satisfy the purposeful availment requirement, namely "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. 1032, 94 L. Ed. 2d at 104. We discuss a sampling of such cases.

The Supreme Court of Arizona found jurisdiction over an Italian firearm's manufacturer which sold guns, manufactured to meet United States specifications, to an intermediary distributor F.O.B. Milan, which then sold them to a distributor serving the United States market, which finally sold the gun that was the subject of the litigation to the end user consumer in Tucson, Arizona. *A. Uberti & C. v. Leonardo*, 181 Ariz. 565, 892

P.2d 1354, 1355-65 (1995). An accidental discharge of the gun killed a family member of the purchaser and defective design was alleged. *Id.* at 1356-57. The court rejected defendant's argument that its activities, at best, focused on the United States in general, not Arizona. *Id.* at 1362-64. The court stated:

> Were this true, then no individual state could assert jurisdiction over Defendant simply because Defendant did not target a particular state or group of states but instead intended to sell its product to all of America. The argument turns common sense on its head. Holding that a defendant intending to sell its products to any and all citizens in the United States could not be held accountable in any jurisdiction where its products caused injury defies any sensible concept of due process. We have no doubt that Defendant did not care whether its guns were sold in Arizona, Massachusetts, or California, but it is quite clear that through its distributor Defendant contemplated serving the market throughout America. Given evidence of intent to serve this market, according to Justice O'Connor's opinion in *Asahi* principles of due process permit suit against Defendant in states where its products cause damage.

> Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but

> arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.
>
> [*Id.* at 1362 (quoting *Asahi*, *supra*, 480 U.S. at 110, 107 S. Ct. at 1031, 94 L. Ed. 2d at 103).]

The court did "not believe that Plaintiffs must show Defendant's specific intent to sell in Arizona. An intent to sell across America is enough." *Ibid.* Further, rejecting an argument similar to that made by defendant in the case before us, the court said, "We do not believe that a foreign manufacturer that knowingly and intentionally distributes its products in America through an American company can avoid jurisdiction of American courts by the simple expedient of closing its eyes and making no effort to learn about or restrict distributor's activities," noting that a manufacturer has the option of limiting its risk by precluding its distributor from selling its product in particular states. *Id.* at 1362-63.

Addressing the second prong of the due process analysis, fair play and substantial justice, the court concluded that Arizona's interest in protecting the

health and safety of its residents was a substantial state interest. *Id.* at 1364. The accident happened in Arizona, and most witnesses and material evidence was located there. *Ibid.* Those important local interests far outweighed any inconvenience to the defendant in having to litigate the case in Arizona. *Ibid.* Accordingly, the exercise of jurisdiction was fair and reasonable. *Id.* at 1364-65.

Finally, the court noted a public policy consideration, namely that due process should not provide a safe harbor allowing alien corporations to ship potentially dangerous products to the United States, driving American manufacturers out of business while allowing the alien companies to produce, with immunity, dangerous products for distribution in this country. *Id.* at 1363.

In *Fortis Corporate Insurance v. Viken Ship Management*, 450 F.3d 214, 220-22 (6th Cir.2006), the court found a sufficient "plus factor" to impose jurisdiction in Ohio over a Norwegian owner of ocean-going cargo vessels because it outfitted its vessels to ship products to the Great Lakes, and its vessels did make frequent calls to Great Lakes ports over a period of years including Toledo, Ohio. The ship owner chartered a fleet of vessels to a Canadian company for several years to transport cargo on an as-needed basis. *Id.* at 215. The Canadian company then subchartered the ship in question to a United States company to transport goods from Poland to Toledo and en route sea water entered the cargo hold and damaged the goods. *Ibid.*

The court also found the second prong satisfied. *Id.* at 223. Recognizing the caution to exercise great care when dealing with personal jurisdiction in the international field, the court noted that Ohio's strong interest in insuring that shipments to its ports are reliable and the plaintiff's interest in obtaining relief in an Ohio court outweighed any inconvenience to the defendant. *Ibid.*

In a patent infringement case, the Federal Circuit found jurisdiction in Virginia over the Chinese manufacturer of a ceiling fan, transferred from the manufacturer to its New Jersey distributor, which then shipped it to Virginia for sale to customers through an intermediary, Builder's Square. *Beverly Hills Fan Co., supra*, 21 F.3d at 1559-72. The court concluded that from the ongoing relationships between the various parties in the distribution chain, "it can be presumed that the distribution channel formed by [the manufacturer and its New Jersey distributor] and Builder's Square was intentionally established, and that defendants knew, or reasonably could have foreseen, that a termination point of the channel was Virginia." *Id.* at 1564. The manufacturer's sole contact with Virginia resulted from indirect shipments through the stream of commerce. *Ibid.* The court found that specific jurisdiction was established under either version of the stream-of-commerce theory expressed in *Asahi* (including, of course, Justice O'Connor's more restrictive formulation) because the Chinese manufacturer and New Jersey distributor acted "in consort, placed the accused fan in the stream of commerce, they knew the likely destination

of the products, and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there." *Id.* at 1566.

In *Tobin v. Astra Pharmaceutical Products, Inc.*, 993 F.2d 528, 542-45 (6th Cir), *cert. denied*, 510 U.S. 914, 114 S. Ct. 304, 126 L. Ed. 2d 252 (1993), the court held a Netherlands drug manufacturer subject to *in personam* jurisdiction in Kentucky, in circumstances in which its products were submitted to the Food and Drug Administration (FDA) for approval and then distributed through its exclusive United States distributor to an end user in Kentucky. The court held that the manufacturer's direct efforts in obtaining FDA approval allowed the manufacturer "to avail itself of the vast, lucrative markets of each state in the United States." *Id.* at 543. The manufacturer's licensing agreement with the distributor authorized the distributor to distribute the drug that was the subject of the litigation and allegedly caused harm to plaintiff, throughout its territory, defined in the agreement as "the United States of America, its territories and possessions, and Puerto Rico." *Ibid.* Applying Justice O'Connor's test, the court noted that the manufacturer "made a deliberate decision to market [the drug in question] in all 50 states, including Kentucky, the forum state." *Ibid.* The court went on to explain that the manufacturer

> did not, for example, seek a "New England regional distributor" or a distributor for specific states. It sought and obtained a

> distributor to market its product in each and every state. Even the *Asahi* plurality recognized that "marketing the product through a distributor who has agreed to serve as the sales agent in the forum State" can "indicate an intent or purpose to serve the market in the forum State."
>
> [*Id.* at 544 (quoting *Asahi*, *supra*, 480 U.S. at 112, 107 S. Ct. at 1032, 94 L. Ed. 2d at 104).]

The court also considered as an additional factor that the manufacturer "arguably also kept control over an essential element of the product the package insert." *Ibid.*

The court concluded that the manufacturer could not expect to rely solely on the use of an independent distributor to insulate itself from suit. *Id.* at 544. It submitted its drug application to the FDA for approval, conducted clinical studies in the United States, and sought out a United States distributor to "exploit the United States market." *Ibid.* Thus, the manufacturer did not simply place its product into the stream of commerce but "purposefully availed itself of the privilege of conducting business in all states, including the state of Kentucky." *Ibid.* The court found misguided the manufacturer's argument that it did nothing in particular to purposely avail itself of the forum market, as distinguished from any other state: "If we were to accept defendant's argument on this point, a foreign manufacturer could insulate itself from liability in each

of the fifty states simply by using an independent national distributor to market its products, a result we specifically rejected in [another case]. [The manufacturer] cannot deny that by licensing [its distributor] to distribute [the drug] in all fifty states it employed the distribution system that brought [the drug] to Kentucky." *Ibid.*

The court also found the second prong of the due process test satisfied. *Id.* at 544-45. Applying the more stringent standard pertaining to international defendants, the court found that the interests of the forum state and the plaintiff were very high, in that a Kentucky resident was injured, and those legitimate and important interests outweighed any inconvenience to the alien manufacturer in having to litigate the case in Kentucky. *Id.* at 545.

In the case before us, defendant purposefully established a distribution scheme by which McIntyre America would serve as its conduit for sales of defendant's machines in all fifty states, including New Jersey. Crediting defendant's assertion that it did not know the identity or location of customers to whom McIntyre America sold the machines, we are nevertheless satisfied that defendant's conduct in establishing and operating under this exclusive distributorship arrangement constituted the necessary other conduct by which it purposefully availed itself of the benefits and protections of all fifty states, including New Jersey. Additionally, defendant designed the machine that is the subject of this litigation to conform

to United States specifications and requirements, and represented such compliance in the instruction manual that came with the machine. Finally, senior personnel of defendant attended national trade shows in the United States, exhibiting its products jointly with its exclusive United States distributor in an effort to make sales to customers in any or all of the states of the union. Indeed, Frank Curcio attended such a show and visited the joint exhibit of defendant and McIntyre America, which provided him with the information and inducement to purchase the machine that is the subject of this case.

Considering all of the circumstances, we conclude that, under the "stream-of-commerce plus" theory, defendant engaged in purposeful conduct to avail itself of the New Jersey market, thus constituting sufficient minimum contacts with New Jersey to justify the assertion of in personam jurisdiction.

The second prong requires little discussion. Once minimum contacts are established, the burden is on the defendant to present compelling reasons why the interests of fair play and substantial justice would be violated by asserting jurisdiction. *Int'l Shoe*, *supra*, 236 U.S. at 316, 66 S. Ct. 158, 90 L. Ed. at 102. Consideration should be given to several factors in determining the reasonableness of the exercise of jurisdiction in each case, including the burden on the defendant, the interests of the forum state, the plaintiff's interest in obtaining relief, the interest of the interstate judicial system in obtaining the most efficient resolution of controversies, and the shared interest of the several

states in furthering fundamental substantive social policies. *World-Wide Volkswagen*, *supra*, 444 U.S. at 292, 100 S. Ct. at 564, 62 L. Ed. 2d at 498. In this case, dealing with an alien defendant, we must also be mindful of the need to give great care to the reasonableness inquiry. *Asahi*, *supra*, 480 U.S. at 115, 107 S. Ct. at 1034, 94 L. Ed. 2d at 106-07.

New Jersey has a very strong interest in providing a forum for its injured workers who sustain industrial accidents here. *Cruz*, *supra*, 253 N.J. Super. at 74, 600 A.2d 1238. Plaintiff, of course, shares that interest. New Jersey law will apply in this products liability action. *Ibid.* The machine is here, as are plaintiff, his medical providers and others who will be witnesses, and his employer, the buyer of the machine. *Ibid.*

While litigating the case in New Jersey will cause some inconvenience to defendant, it has shown no lack of ability to litigate the jurisdictional aspects of this case, and the record reveals that it is defending several other cases in various states around the country. By its direct dealings with McIntyre America in Ohio and its attendance at the trade show attended by Frank Curcio in Nevada, defendant may well have been subject to specific jurisdiction in either of those states for the injury caused by this machine, and defendant should have been fully aware of that possibility. Certainly, New Jersey is no more inconvenient to defendant for the litigation than either of those states. And, considering defendant's willingness to travel to the United States to iron out distribution issues with McIntyre America

and to promote sales of its machines at trade shows, we do not deem it unfair or unreasonable to expect it to travel here to respond to claims arising out of the use of its machines.

We have no hesitancy in concluding that subjecting defendant to the jurisdiction of the courts of New Jersey does not offend traditional notions of fair play and substantial justice.

Reversed and remanded.

APPENDIX E ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DISMISSING PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION DATED AND FILED NOVEMBER 3, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

DOCKET NO. BER-L-6857-03

ROBERT NICASTRO and
ROSEANN NICASTRO, husband and wife,

Plaintiffs,

vs.

McINTYRE MACHINERY AMERICA, LTD.; J. McINTYRE MACHINERY LTD.; JOHN DOES 1-10 (fictitious names), and XYZ CORPORATION 1-10 (fictitious names),

Defendants.

ORDER DISMISSING PLAINTIFFS' COMPLAINT FOR LACK OF PERSONAL JURISDICTION

THIS MATTER, having been opened to the Court by DLA PIPER US LLP, attorneys for Defendant J. McIntyre Machinery, Ltd., and upon due notice to all counsel and for good cause shown;

IT IS, on this 3rd day of November 2006.

ORDERED, that the Complaint in the above-captioned matter be and hereby is dismissed as to defendant J. McIntyre Machinery Ltd for lack of personal jurisdiction; and

IT IS FURTHER ORDERED, that a copy of the within Order be served on all counsel within 7 days of the date hereof.

s/ Elijah L. Miller, Jr.
ELIJAH L. MILLER, JR.
JSC

APPENDIX F MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f) DECIDED NOVEMBER 3, 2006

MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f)

TO: Steven F. Gooby, Esq.
DLA PIPER
379 Thornall Street, 8th Floor
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Edison, New Jersey 08837-2226

Alexander W. Ross, Jr., Esq.
Rakoski & Ross, P.C.
76 East Main Street
Marlton, New Jersey 08053-2142

RE: Nicastro v. McIntyre Machinery, Ltd.
Docket Number BER-L-6857-03
Motion to Dismiss for Lack of Personal Jurisdiction
Decided: November 3, 2006
Miller, J.S.C.

STATEMENT OF FACTS & MOVANT'S ASSERTIONS

In his Complaint, plaintiff alleges that on October 11, 2001 he was injured while working on a shear machine in the course of his employment with Curcio Scrap Metal, Inc in Saddle Brook, NJ. Plaintiff alleges that the subject machine was manufactured by J. McIntyre Machinery, Ltd. ("McIntyre"). Plaintiff also named

Appendix F

McIntyre Machinery America, Ltd., Inc. ("MMA") of Stow, Ohio as a defendant in the action.

McIntyre, a U.K. company based in Nottingham, England, does not have the constitutionally required minimum contacts with N.J. to permit the Court's exercise of personal jurisdiction over it. The absence of minimum contact was confirmed during the jurisdictional discovery phase of this case, which was conducted following the Appellate Division's reversal of this Court's dismissal order and remand for such discovery.

McIntyre now renews its motion to dismiss for lack of personal jurisdiction. A New Jersey Court's exercise of personal jurisdiction over McIntyre would force McIntyre to defend a civil suit in a jurisdiction where it has never sold, advertised or distributed any product, resulting in a patent unfairness to McIntyre. McIntyre has no offices, property, or employees in New Jersey. It has never done business or paid taxes here. As is set forth below, well-established principles of due process prohibit McIntyre from being forced to defend this action in New Jersey. Because plaintiffs have failed to meet their burden of establishing that McIntyre is subject to personal jurisdiction in a New Jersey Court even after extensive jurisdictional discovery was conducted the Court should again grant McIntyre's motion to dismiss for lack of personal jurisdiction.

J. McIntyre manufactures and ships shearing machines. *See*, Certification of Sally Johnson,

paragraphs 2-5. In 1995, J. McIntyre manufactured the machine at issue in this case and shipped it to a purchaser in Stow, Ohio. *Id.* at 7, McIntyre does not directly market, sell or solicit the business of anyone in New Jersey to buy its products, nor does it maintain an office in New Jersey. *Id.* at 14, and 16. McIntyre has no employees in New Jersey nor does it have any agents here. *Id.* at 17. McIntyre is not licensed to do business in New Jersey, and does not have a registered agent in New Jersey. *Id.* at 20-21. Although it maintains a website, McIntyre does not solicit sales or provide a means to purchase products through its website, and McIntyre has not knowingly received or responded to any requests for information about its products through its website or electronic mail from any business or individual located in New Jersey. *Id.* at 23.

The purchaser, McIntyre Machinery America, Ltd. (MMA) is an Ohio corporation with its principal place of business in Stow, Ohio. *Id.* MMA is not now nor has it ever been affiliated with J. McIntyre. *Id.* MMA is a separate entity with no common owners or managers with J. McIntyre. McIntyre cannot be certain that it manufactured the machine in question because it recently learned that MMA may have copied the designs of certain McIntyre products and sold them in the U.S.A. without McIntyre's knowledge. *Id.* at 7. McIntyre had no knowledge of the business dealing between MMA and its customers including Curcio Scrap Metal, Inc. *Id.* at 10. McIntyre did not ship or otherwise transfer the subject machine from Ohio to New Jersey, nor was McIntyre in any way involved or knowledgeable of such transaction. *Id.* at 11.

Appendix F

Plaintiffs bear the burden of establishing personal jurisdiction. *Reliance Nat'l Ins. Co. In Liquidation v. Dana Transp., Inc.*, 376 N.J. Super. 537, 546 (App. Div. 2005); *A.V. Imports, Inc. v. Col De Fratta S.A.*, 171 F. Supp. 2d. 369, 371 (D.N.J. 2001). As the Appellate Division explained, once the defendant has "shown that [it] has no territorial presence in this state," the burden shifts to the plaintiff, "who must then demonstrate [the defendant's] amenability, nonetheless, to an exercise of *in personam* jurisdiction based on minimum contacts." *Citibank, N.A. v. Estate of Simpson*, 290 N.J. Super. 519, 533 (App. Div. 1996). Plaintiffs have failed to sustain their burden.

New Jersey's long-arm rule provides for the assertion of personal jurisdiction consistent with due process of law. Rule 4:4-4(b)(1). This court may exercise personal jurisdiction over J. McIntyre if both requirements of a two-prong test prescribed by the due process clause are satisfied. *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322 (1989). First, the court must determine that the defendant has sufficient minimum contacts with the forum state. *Id.* Second, the court must find that it would comport with traditional notions of fair play and substantial justice to assert jurisdiction over the defendant. *Id.*

The plaintiff must establish either specific jurisdiction, that the particular cause of action arose from the defendant's activities in the forum state, or general jurisdiction, that the defendant has continuous and systematic contacts with the forum state. *Waste*

Management, Inc. v. Admiral Ins. Co., 138 N.J. 106, 119 (1994). In this case, general jurisdiction does not exist over McIntyre because there is no evidence of any "continuous and systematic" contacts with New Jersey. Plaintiffs have not disputed this fact.

Specific jurisdiction exists when the particular cause of action sued upon arose from the defendant's activities in the forum State. *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119 (1994). In the context of specific jurisdiction, the "minimum contacts inquiry must focus on 'the relationship among the defendant, the forum, and the litigation.'" *Lebel*, 115 N.J. at 323 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

First, the court must examine whether minimum contacts with New Jersey exist. "The relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). It is essential, therefore, that the defendant purposefully availed itself of conducting activities with the forum state. *Hanson v. Denckla*, 357 U.S. 235 (1958). A fundamental purpose of the minimum contacts test is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp., supra.* at 291-92. The requirement that the defendant's "conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there" affords a "degree of predictability" so that potential

defendants may know where they are amenable to a lawsuit and structure their conduct accordingly. *Id.* at 297.

Plaintiffs cannot meet this burden. McIntyre never purposefully availed itself of the privilege of doing business in New Jersey. It did not sell the machine at issue to a customer in New Jersey. In fact, it has never sold or shipped any machine to a customer in New Jersey. It has no presence in this State. McIntyre is a British company which, during all relevant times, sold and shipped shears and other equipment to MMA in Ohio. Subsequently, as it appears from a copy of an invoice obtained by plaintiffs, MMA resold and shipped a shear machine to Curcio Scrap Metal, Inc., Mr. Nicastro's employer in New Jersey. McIntyre had no control over the process or means by which the at-issue machine came into New Jersey, nor did it have any knowledge of that transaction.

As the Supreme Court has made clear, when contacts with the forum state are merely "'random,' 'fortuitous,' or 'attenuated,'" there can be no purposeful availment. *Burger King Corp.*, 471 U.S. at 475. Even if plaintiff did suffer injury while using a machine manufactured by McIntyre, that is simply not enough to establish the necessary element of purposeful availment. *World-Wide Volkswagen Corp.*, *supra*, at 298. The relevant constitutional inquiry is whether McIntyre ever engaged in a purposeful activity in New Jersey. Because there are no facts to support such a finding even after plaintiffs conducted extensive jurisdictional

discovery at the direction of the Appellate Division there is no basis for this Court to exercise personal jurisdiction over McIntyre. Accordingly, the Court should grant McIntyre's motion to dismiss this matter.

Although a McIntyre shear machine may have made its way to New Jersey, it cannot be said that McIntyre had anything to do with that result. The most that can be said is that McIntyre sold the subject machine to MMA, an Ohio-based purchaser, and shipped it to MMA in Ohio with no knowledge or reason to know that MMA would later sell and ship the machine into New Jersey. Under prevailing law, McIntyre's act of placing the machine into the "stream of commerce" outside of New Jersey is not enough to satisfy the due process requirements necessary for this Court to exercise personal jurisdiction over McIntyre. In *Asahi Metal Indus. Co. v. Superior Ct. of California*, 480 U.S. 102 (1987), the United States Supreme Court held that merely placing a product into the stream of commerce elsewhere, even with some awareness that the product may ultimately reach the forum state, does not constitute purposeful availment of the forum state and thus cannot be deemed a sufficient minimum contact with the forum state for personal jurisdiction purposes. However, the Justices did not agree on the scope of the stream-of-commerce theory of whether minimum contacts existed on the facts presented.

Four Justices, led by Justice O'Connor, were of the view that ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the

forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State." *Id.* at 112. "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully direct toward the forum State." *Id.* Additional conduct of the defendant could include designing a product particularly for the forum state, or marketing through a sales agent in the forum state. *Id.*

Four other Justices, led by Justice Brennan, rejected the "additional conduct" requirement. In their view, "the stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117. Thus, this plurality found that because Asahi was aware of the distribution system that brought its products into California, there were sufficient minimum contacts. *Id.* at 119-120.

Yet, despite their dispute over the scope of the stream of commerce theory, both pluralities agreed that a finding of minimum contacts requires some purposeful availment by the defendant in the forum state. *See, Renner v. Lanard Toys Ltd.*, 33 F. 3d. 277, 282 (3rd Cir. 1994). *See also*, Movant's Exh. 1, *Masterson v. B.J. Store Inc.*, No. 03-3202, 2005 U.S. Dist. Lexis 18090 (D.N.J. Aug. 17, 2005), lack of personal jurisdiction

pursuant to *Asahi* case. *See also, Leia v. Schmidt Mfg., Inc. v. Sypris Tech. Inc.*, No. 01-5042, 2005 U.S. Lexis 18144 (D.N.J. Aug. 15, 2005), Movant's Exh. 2.

Here, under either view of the stream of commerce theory espoused by the Asahi Court, McIntyre is not subject to the personal jurisdiction of the New Jersey Courts. First, under the Brennan view, McIntyre had no knowledge that one of its products might be sold or delivered to New Jersey. Moreover, the alleged sale of a single McIntyre machine by MMA to Curcio Scrap Metal and the product's shipment from Ohio to New Jersey, all without McIntyre's knowledge or control, was not a regular and anticipated flow of McIntyre's products to New Jersey.

Second, under the O'Connor view, there was no additional conduct by McIntyre that would establish minimum contacts with New Jersey. As plaintiffs' post-appeal jurisdictional discovery confirmed, McIntyre did not design any product for the New Jersey market, McIntyre did not advertise in New Jersey, not did it provide advice to any New Jersey user of its machines. Furthermore, McIntyre has never marketed its products through a New Jersey distributor. Accordingly, the lack of additional conduct by McIntyre in New Jersey and the corresponding lack of minimum contacts compel the conclusion that this Court does not have personal jurisdiction over McIntyre.

Appendix F

As the Court explained in *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 319-320 (1989):

> "It seems that little profit can be gained from an extended analysis of Supreme Court doctrine until the Court itself draws the lines as the umpire of federalism. In its last effort, the Court split four-four-one on its elucidation of a "stream-of-commerce" theory of jurisdiction. [citing] *Asahi Metal Indus. Co. v. Superior Court of Cal., 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987).* In our last effort, *Charles Gendler & Co. v. Telecom Equipment Corp., 102 N.J. 460 (1986)*, we accepted the stream-of-commerce theory as a valid method of discerning the contours of due process. Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall hew closely to the limited fundamentals about which there is little or no dispute or debate.
>
> We shall attempt to avoid any areas of unsettled jurisprudence. Hence we shall not predicate our result on the "stream-of-commerce" theory of jurisdiction. Rather, we shall stay with the basics."

Id. at 319-322.

Thus, after conduction a basic minimum contacts analysis, the Lebel Court found that a Florida boat

retailer had sufficient minimum contacts and was therefore subject to personal jurisdiction in New Jersey. Those contracts included telephone calls by the retailer to the plaintiff in New Jersey on at least 20 separate occasions, the retailer's mailing of the sales contract to the plaintiff in New Jersey where it was signed, the retailer's receipt of payment from New Jersey, and the retailer's knowledge that the boat was going to be used in New Jersey. In stark contrast, there is no evidence of any such contacts in the instant case.

Finally, in *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106 (1994), the Supreme Court revisited the stream of commerce doctrine. The Court reiterated the *Asahi* plurality's holding, without reservation, as the law of this State: "In Asahi, the defendant was found to have had no minimum contracts to California when it did not purposely avail itself of the California market and had no control over the distribution system that brought its products to California." *Id.* at 126. As the foregoing demonstrates, plaintiffs cannot establish that McIntyre is subject to this Court's jurisdiction under either a "basic" personal jurisdiction analysis or under any prevailing view of the stream of commerce theory. There is simply no evidence that McIntyre ever engaged in a purposeful activity in New Jersey. Moreover, McIntyre had no knowledge that one of its products would end up in New Jersey, nor did it have control over the distribution system by which it came here. The fact that the subject shear machine found its way to New Jersey, without more, is not sufficient to satisfy the minimum contacts requirement of the Due Process Clause. Accordingly, this Court should not exercise personal jurisdiction over McIntyre.

Appendix F

OPPOSITION

Plaintiffs argue that the Court did have specific personal jurisdiction over defendant J. McIntyre, due to its "minimum contacts" with New Jersey and its purposeful availment of the United States market including New Jersey, evidenced by its shipment of goods there, its holding of US patents, its repeated participation in national trade shows inside of the United States, and its vicarious liability by use of its exclusive American agent and distributor, McIntyre Machinery America, Ltd. Evidence exists that J. McIntyre actively seeks buyers in the state of New Jersey, through their exclusive U.S. dealer, and via their website. Their exclusive U.S. agent identified at least four scrap metal companies in New Jersey have J. McIntyre Machinery. *See*, Non-Movant's Exh. V, and W. Thus, not only does J. McIntyre have minimum contacts with the state of New Jersey due to their tortious conduct within the state, but they purposefully avail themselves of the North American market, including New Jersey.

On a motion to dismiss for lack of personal jurisdiction, a court must accept as true the uncontroverted allegations of the party seeking to assert jurisdiction and resolve in its favor all conflicts between the facts contained in the parties' affidavits and other documents. Rule 4:6-2. Thus, where no discovery has been conducted and no evidentiary hearing held, the plaintiff only has to make a prima facie showing that jurisdiction is proper.

Appendix F

New Jersey has a long-arm rule that permits its courts to exercise personal jurisdiction over nonresident defendants within the borders of due process of law. Rule 4:4-4(b)(1). Due process requires the defendant to have minimum contacts with New Jersey such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts inquiry examines the defendant's purposeful activity within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The minimum contacts requirement may be satisfied under the stream of commerce theory. "If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those states. The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum state." *World-Wide, supra*, at 297-298. The New Jersey Supreme Court adopted the stream of commerce theory in *Charles Gendler & Co. v. Telecom Equipment Corp*, 102 N.J. 460, 472 (1986). In *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989), the New Jersey Supreme Court noted that this theory may have become unsettled after the decision rendered in *Asahi, supra*.

Appendix F

In *Cruz v. Robinson Engineering*, 253 N.J. Super 66 (App. Div.) *certif denied*, 160 N.J. 9 (1992), the court concluded that the stream of commerce theory was not rejected but merely disfavored only if personal jurisdiction could be established under the traditional minimum contacts analysis. The Court in *Cruz* went on to state that "as a matter of its own policy, New Jersey has a considerable interest in providing a forum to those of its citizens who are employed here and sustain industrial accidents here." *Id.* at 74.

J. McIntyre actively seeks to sell its products throughout the United States, including New Jersey. In *LG Electronics Inc. v. First International Computer, Inc.*, 138 F. Supp. 2d. 574 (D.N.J. 2001), the Court found that a Korean electronics firm had purposefully availed itself of doing business in the forum state when it had a US distributor in California to distribute and market its product throughout the United States. *Id.* at 588. This is an identical situation.

J. McIntyre continues to ship goods to the US, holds US patents, has repeatedly participated in national trade shows inside of the United States, and uses an exclusive American agent and distributor, McIntyre Machinery America, Ltd., to distribute products throughout the US. As demonstrated by the contents of its website, and the e-mails from its current US sales agent, J. McIntyre actively pursues sale of its products throughout the United States. It cannot be surprised that it is being brought into court in New Jersey.

Appendix F

Moreover, the defendant's internet activities also create minimum contacts with New Jersey. Courts have developed a sliding scale standard for determining whether to exercise personal jurisdiction over a non-resident defendant based on a defendant's internet activity. *See*, *Machulsky v. Hall*, 210 F. Supp. 2d. 531, 538-540 (D.N.J. 2002). Under this sliding scale, internet sites are categorized in three ways, according to interactivity levels: "(1) interactive sites used to conduct business over the Web; (2) semi-interactive sites allowing the exchange of information with a host computer; and, (3) passive sites allowing access to information but not enabling the exchange of information with a host computer." *Machulsky*, *supra*. Here, defendant no only advertised items for sale over the internet through its website, but its website had interactive content whereby a potential customer could contact the company, and the company would then have the distributor contact the customer. *See*, Non-Movant's Exh. F, Ross Certification.

The second step of the *Lebel* Court's two-step inquiry used to determine whether due process has been satisfied is whether, under the due process component of the Fifth Amendment, the maintenance of the suit offends traditional notions of fair play and substantial justice. In this case, involving catastrophic personal injuries to a New Jersey working man, and the deliberate entry and marketing of the product by the defendant throughout the United States, fair play and substantial justice are not offended, and the public policy and law of New Jersey requires the imposition of jurisdiction over the defendant.

Appendix F

REPLY

The recurrent theme in plaintiff's opposition is that McIntyre purposefully availed itself of the privileges of conducting business in the United States for example, by selling its products to companies in Ohio, Pennsylvania and Texas, by attending trade shows in Nevada and Florida, and by holding United States patents so therefore McIntyre should be subject to a New Jersey court's exercise of personal jurisdiction because New Jersey is one of the fifty United States. This argument fails when cast in the light of well settled precedent of both the United States and New Jersey Supreme Court, which require that a defendant have sufficient minimum contacts with a particular state not the United States generally.

"'[I]t is essential that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefit and production of its laws.'" *Waste Management Inc. v. Admiral Ins. Co.*, 138 NJ. 106, 119 (1994). Plaintiffs fail to present any evidence in their opposition that meets the "purposeful availment" standard. Because McIntyre did not and does not have sufficient minimum contacts with the State of New Jersey, this Court should not exercise personal jurisdiction over McIntyre.

Plaintiffs are unable to point to any credible evidence of contacts with New Jersey. There is no evidence that McIntyre solicited customers in New

Jersey. It is irrelevant whether MMA was covered by McIntyre's liability insurance policies. It is also irrelevant that McIntyre has defended lawsuits in West Virginia, Massachusetts, and Illinois. This does not mean that McIntyre has sufficient minimum contacts with New Jersey to support personal jurisdiction. In addition, plaintiff's reliance on *Cruz v. Robinson Engineering*, 253 N.J. Super. 66 (App. Div. 1992) is misplaced. Unlike the defendant in *Cruz*, McIntyre did not custom design and build equipment for the New Jersey marketplace, *not* did McIntyre have any knowledge that a product it sold to an Ohio company would ultimately end up in New Jersey.

Having failed to establish traditional minimum contacts or purposeful availment, plaintiffs then turn to McIntyre's website in the hope of establishing jurisdiction on that ground. However, plaintiffs have mischaracterized McIntyre's website, which is a passive, non-interactive site that is not directed to customers in New Jersey, or any other state. Accordingly, they cannot rely upon it to establish jurisdiction.

In their opposition, plaintiffs offer an irrelevant *forum non conveniens* "interests" analysis in an effort to persuade the Court that since the plaintiff, the plaintiff's employer and certain evidence are in New Jersey, this case should proceed here. Thus the only relevant fairness inquiry here is that of the fairness to the defendant, McIntyre, having to defend a suit in a state in which it has never done business and with which it has not contacts sufficient to confer jurisdiction over

it. *See, World Wide Volkswagen, supra,* at 291-292. Plaintiffs must first establish the Court's jurisdiction over McIntyre, which they are unable to do.

COURT'S REASONING AND FINDING(S)

On March 5, 2004, this Court heard oral arguments, after submission of briefs by the parties, and issued an opinion and order, dismissing the plaintiff's complaint. *See*, Movant's Exh. C, D, and E. The plaintiff appealed; and, on May 26, 2005, the Appellate Division reversed and remanded pursuant to its opinion.

On June 22, 2005, the Court entered a case management order, which provided a jurisdictional discovery period to end on January 19, 2006. The jurisdictional period was extended by the Court to March 20, 2006. The defendant J. McIntyre Machinery LTD. ("JMM") again moved for an Order to dismiss the complaint for lack of personal jurisdiction over defendant JMM. The plaintiff again opposes the motion.

New Jersey's only limitation upon the exercise of its long arm jurisdiction over a non-resident defendant is that it be "consistent with due process of law." *R.* 4:4-4(b)(1), provides that, "Due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it [New Jersey] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *See, Lebel v. Everglade Marina Inc.*, 115 N.J.

317, 322 (1989), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In order to determine whether personal jurisdiction can be exercised over the defendant, the court must determine whether there are sufficient minimum contacts such that the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The minimum contacts portion of the analysis, if there is no general jurisdiction as in this case, requires the defendant to have purposefully availed itself of the protection of the laws of New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey. The second part of the analysis examines the foreseeability of being brought to court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the stream of commerce with the expectation that the product would be purchased by consumers in New Jersey. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *See also*, prior opinion and order dated March 5, 2004, Exhibits C, D, and E of Movant's brief. This Court can only exercise personal jurisdiction over defendant JMM if (1) JMM has certain minimum contacts "with New Jersey such that they could 'reasonably anticipate being haled into Court [here];'" *See, World Wide Volkswagen Corp. v. Woodson.* 444 U.S. 286, 297, 62 L. Ed. 2d. 490, 100 S. Ct. 559 (1980); and, (2) "the assertion of personal jurisdiction would comport

with 'fair play and substantial justice.' *See, Burger King Corp., Rudzewicz*, 471 U.S. 462, 476, 85 L. Ed. 2d. 528, 105 S. Ct. 2174 (1985). The burden to establish personal jurisdiction rests upon the plaintiffs Nicastro. *See, Carteret Sav. Bank, F.A. v. Shushan*, 95 F. 2d. 141,146 (3rd Cir. 1992); *Wartsila NSD North America v. Hill Intern. Inc.*, 269 F. Supp. 2d. 547 (D.N.J. 2003), *Citibank v. Simpson*, 290 N.J. Super. at 533.

First, the court must analyze the defendant's contacts with New Jersey. The record does not reflect any activity taken on the part of the defendant in the state of New Jersey. The defendant has no contacts with the state of New Jersey. Defendant JMM does not directly market, sell, nor solicit the business of anyone in New Jersey to buy its products, nor did it ever do so. *See*, Sally Johnson Certification, para. 14-22. The defendant JMM does not maintain a sales staff in New Jersey, did not provide maintenance or repair services for it products to businesses or individuals in N.J. *Id.* The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The defendant does not have a single contact with New Jersey short of the machine in question ending up in this state. The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but fails to produce any evidence as to that fact. Indeed, the evidence is that MMA is not a subsidiary of JMM. *See*, Sally Johnson Certification, para. 8. As a result, the plaintiff has failed to make a prima facie showing that the defendant has sufficient minimum contacts with New Jersey to subject it to

personal jurisdiction in this state. *See*, *World-Wide*, *supra; Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant if that system purposefully brought the defendant's shear machines to New Jersey. *Asahi*, *supra*, at 112. The fact that the defendant may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Notwithstanding the extensive, additional jurisdictional discovery period, *supra*, the Court still finds that "there is insufficient evidence to sustain jurisdiction by hewing to the fundamentals as to which there [remains] little or no dispute." *See*, Appellate Division opinion, *supra*, at page 4, Movant's Exh. F, and opinion of this Court, dated March 5, 2004, Movant's Exh. D, as well as papers submitted in opposition to this motion. Here, the plaintiff can not meet its burden to establish personal jurisdiction. Indeed, even when purported contacts are "random, fortuitous, or attenuated," there can be no purposeful availment. *See, Burger King Corp.*, 471 U.S. at 475, and *World Wide Volkswagen*, *supra*, at 298.

Assuming *arguendo* minimum contacts, the plaintiff has not established that the defendant could foresee itself being haled into court in New Jersey even utilizing

a stream of commerce theory. This theory is currently unsettled in both federal and state law. *See, Asahi, supra; World-Wide, supra; Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66 (App. Div. 1992); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989). However, even utilizing the most liberally accepted form of the stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey. "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide, supra*, at 297-298. There is no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey. Plaintiff cites *LG Electronics, Inc. v. First International Computer*, 138 F. Supp. 2d. 574, 588 (D.N.J. 2001), which is readily distinguishable from the matter at bar. There, in *LG* the parties did not dispute that there was personal jurisdiction over FICA in the Northern District of California. The Court in *LG* continued its analysis in accord with the following factors: (1) that the defendant purposefully directs its activities at the residents of the forum (California), (2) the claim arises out of or relates to those activities, and (3) jurisdiction is Constitutionally reasonable and fair. *See, Genetic Implant Sys. Inc. v. Core-Vent Corp.*, 123 F. 3d. 1455, 1458 (Fed. Cir. 1997). Finally, FIC and FICA were manufacturer and subsidiary, which is a critical distinction from the matter at bar.

Appendix F

The assertions regarding the website, See, Exhibits F and G, of plaintiff's papers, are unavailing. The website is passive and not interactive; and clearly not a purposeful availment to do business in this state. This is not a minimum contact, only conjecture. *See*, Certification of Sally Johnson, para 23, and Exh. C of plaintiff's opposition papers. Pursuant to Paragraph 23, of said Johnson Certification, it provides as follows: "Although it maintains an internet website, J. McIntyre (JMM) does not solicit sales or provide a means for residents of New Jersey or any other state in the United States to purchase J. McIntyre (JMM) products through its website. To date, J. McIntyre (JMM) has not knowingly received or responded to any request for information about its products through its website or electronic mail from any business or individual located in New Jersey, with the exception of an electronic message sent by plaintiff's counsel in this matter before the complaint was served." This Certification is unrebutted by the plaintiff. *See, Ragonese v. Rosenfeld*, 318 N.J. Super. 63, 68-69 (Law Div. 1998), citing *Blumenthal v. Drudge*, 992 F. Supp. 44, 54-57 (1998) explaining the differences between active and passive internet sites, and the resulting legal consequences based on the type of website. Here, the Court finds that the website was a passive site allowing access to information but not enabling the exchange of information with the host computer, nor contacts with the host computer, nor conducting business directed to New Jersey. Simply put, this website lacks the requisite interactivity and commercial nature of exchange of information.

See, Machulsky v. Hall, 210 F. Supp. 2d. 531, 538-539 (D.N.J. 2002). *See,* Plaintiff's Exh. G. When a defendant, such as JMM, merely posts information or advertisements on a website, as here with JMM, personal jurisdiction over a defendant, such as JMM, can not be upheld. *See, Machulsky, supra,* at 540, "Absent a showing that defendant purposefully directed his published statements toward the seller as either a business woman, or attorney in New Jersey, or toward the State itself," the posting of information of advertisement on a website, does not afford personal jurisdiction over such a defendant; *See, Machulsky, supra,* at 538-540.

In *LG* the Court found that FIC purposefully directed its activities at California. Thereby, the Court held that the stream of commerce theory was applicable because FIC has minimum contacts with California sufficient to satisfy this prong. Here, the plaintiffs have utterly failed to establish such minimum contacts as well as purposeful availment, or that the defendant J. McIntyre Machinery LTD. ("JMM") purposefully directed its activities at New Jersey. It must be remembered that MMA, based in Ohio, was neither a subsidiary, nor affiliated with JMM. Neither was JMA a corporate parent of MMA. MMA is an entirely separate business entity; and, JMM has never had, not shared either common owners, managers, or employees with MMA. *See,* Certification of Sally Johnson. In contrast to *LG,* this Court finds that plaintiff has not met the minimum contacts test. *See, World Wide Volkswagen Corp., supra,* at 291-292. As noted in *World Wide*

Volkswagen, *supra*, at 292: ". . . [T]he relationship between the defendant and the forum [here New Jersey, *not* United States] must be such that it is 'reasonable . . . to require the corporation [here defendant JMM] to defend the particular suit which is brought [here].'" *See also*, *Waste Management Inc. v. Admiral Ins, Co.*, 138 N.J. 106, 119 (1994). The "minimum contacts inquiry must focus on the relationship among the defendant, the forum, and the litigation." *See*, *Lebel*, *supra*, at 323 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)).

The plaintiff seeks to rely upon *Cruz*, *supra* in opposing this motion. However, Cruz is easily distinguishable from the case at bar. In particular, the plaintiff relies upon the language in *Cruz* that states that additional relevant factors of the case balance in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the aforementioned minimum contacts and purposeful availment analysis. In addition, *Leber*, *supra* is more reliable in that it was decided by the Supreme Court of New Jersey. It should also be noted that the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. *See*, *Asahi*, *supra*. The so called stream of commerce theory is clearly unsupportable in the context of the facts at bar. *See*, *Asahi*, *supra*, involved a product liability case the grew out of a motorcycle accident in California. The allegations were that the motorcycle tire, tube and sealant were defective. *Id.* at 105-106. The plaintiff sued the Taiwanese manufacturer of the tube, which in turn filed

a cross complaint for indemnification against *Asahi Metal Industry*, who had manufactured the tube's valve assembly. *Id.* at 107. Comparable to the facts in this case, *Asahi*, too, had no offices, property, nor presence in California (the forum state). *Asahi* neither solicited business, not made direct sales on the state, nor did it design nor control the system of distribution that brought its product into the forum states. *Id.* at 108. *Asahi* challenged personal jurisdiction in California.

While the decision was a plurality decision, the principles of *Asahi* obtain here. Justice O'Connor held that California courts could not exercise personal jurisdiction over *Asahi* because to do so would not comport with notions of fair play and substantial justice as due process requires. For four justices, Justice O'Connor wrote that: ". . . a defendant's awareness that the stream of commerce may or will sweep the product into the forum state does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum state." *Id.* at 112. Succinctly, Justice O'Connor held that ". . . [T]he placement of a produce into the stream of commerce, without more, is not an act of the defendant purposefully directed to the forum state." *Id.* Under Justice O'Connor's plurality, the plaintiff must demonstrate "additional conduct . . . that may indicate an intent or purpose to serve the market in the forum state." *Asahi, supra*, at 112.

Justice Brennan wrote for four (4) other justices, he expressly rejected "additional conduct" requirement.

Justice Brennan wrote, with respect to "additional conduct," that: "The stream of commerce refers not to unpredictable currents or eddies, *but to the regular and anticipated* flow of products from manufacture to distribution to retail to sale. As long as a participant in this process is aware that the final product is being *marketed* in the forum state, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117 (Emphasis added).

Suffice that both pluralities held that the scope of stream of commerce theory require a finding of minimum contacts which is inclusive of purposeful availment by the defendant in the forum state. *See*, *Asahi*, *supra*, and *Renner v. Lanard Toys LTD.*, 33 F. 3d. 277, 282 (3rd Cir. 1994). Here, under either view of the stream of commerce theory expressed by the plurality of *Asahi*, *supra*, the defendant JMM cannot be subject to personal jurisdiction in New Jersey. In addition, the fact that the plaintiff was injured in New Jersey does little to create personal jurisdiction over the defendant, with the requisite minimum contacts and purposeful availment of this forum (New Jersey).

As a result of the foregoing, the motion to dismiss for lack of personal is granted.

s/ Elijah L. Miller, Jr.
Hon. Judge Elijah L. Miller, Jr., J.S.C.

APPENDIX G EXCERPTED TRANSCRIPT OF MOTION TO DISMISS DATED NOVEMBER 3, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO. L-6857-03
APP. DIV. NO.

ROBERT NICASTRO, ROSEANN NICASTRO,

Plaintiffs,

vs.

MC INTYRE MACHINERY AMERICA, Ltd, et al,

Defendants.

Place: Bergen County Courthouse
10 Main Street
Hackensack, New Jersey
Date: November 3, 2006

BEFORE:

HONORABLE ELIJAH L. MILLER, JR. J.S.C.

[commencing at p. 62] * * *

THE COURT: All right. Suffice at this point, I'm going to rule in regard to put to bed, in regard to the *Gendler*. That's Charles Gendler, G-e-n-d-l-e-r & Company Telecom question.

Appendix G

Lebel v. Everglades Marina, Inc., 115 N.J. [63] 317, 319 to 320 said:

> "It seems that little profit can be gained from an extended analysis of a Supreme Court doctrine till the Court itself draws the lines as to the umpire of federalism. In its last effort, the Court split four to one in its elucidation of the stream of commerce theory of jurisdiction citing *Asahi*, 480 U.S. at 117."
>
> "In our last effort in *Charles Gendler & Company at Telecom Equipment*, 102 N.J. 460 (1986), we accept the stream of commerce theory as a valid method concerning the contours of due process.
>
> "Rather than embark on a prediction of the future course of this stream of jurisprudence, we shall now hue closely to the limited fundamentals by which there is little or no dispute or debate. We shall attempt to avoid errors of unsettled jurisprudence; hence, we will predicate our results from the stream of commerce theory justification rather than stay along the basics at this point in time."

And they went through a basis analysis in [64] *Lebel.* At this point, they clearly were aware of its prior decision, and they defined what that prior decision would be under the context of *Lebel.*

Appendix G

Lebel is at 115 N.J. 317 (1989), three years after that case.

In March 5th, 2004, this Court heard oral arguments after submission of briefs by the parties and issued an opinion and order dismissing the plaintiff's complaint. See Movant's Exhibit C, D, and E.

The plaintiff appealed, and on May 26, 2005, the Appellate Division reversed and remanded pursuant to its opinion.

On June 22nd, 2005, this Court entered a case management order, which provided a jurisdictional discovery period to end January 19, 2006. The jurisdictional period was extended by this Court to March 20, 2006.

Defendant J. McIntyre Machine, Ltd., henceforth, JMM, again moves for an order to dismiss the complaint for lack of personal jurisdiction over defendant J over defendants JMM.

The plaintiff again opposes the motion.

New Jersey's own limitation upon exercise of its long arm jurisdiction over a non-resident defendant is that it be consistent with due process law, pursuant [65] to Rule 4:4-4(b)1, provides that, quote:

> "Due process requires only that an order to subject a defendant to a judgment of in

> personam if he be not present within the territory of the forum," this is New Jersey "he" in this case, it, that is JMM "have certain minimal contacts with it," that is New Jersey "such that the maintenance of it so it does not offend traditional notions of fair play and substantial justice."

See *Lebel v. Everglades Marina Inc.*, 115 N.J. 317 at Page 322 (1989), quoting *International Shoe Company v. Washington* at 326 U.S. 310 at Page 316 (1945).

> "In order to determine whether personal jurisdiction can be exercised over the defendant, the Court must determine whether there are sufficient minimal contacts, minimum contacts, such that the suit does not offend traditional motions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310 at Page 316 (1945)

> "The minimum contacts portion of the [66] analysis, if there is no general jurisdiction, as in this case, requires the defendant to have purposely availed itself of the protection of the laws in New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey.

Appendix G

> "The second part of the analysis examines the foreseeability of being brought to the Court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the stream of commerce with the expectation that the product would be purchased by consumers in New Jersey." See *Worldwide Volkswagen's Corp. v. Woodson*, 444 U.S. 286 (1980). See also prior opinion of this Court and the order of this Court dated March 5th, 2004. See Exhibits C, D, and E of the movant's brief.

The Court can only exercise personal jurisdiction over defendant JMM if:

One, JMM has certain minimal contacts with [67] New Jersey, such that they would "reasonably anticipate being hailed into the court here." See *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286 at Page 297, 62 Lawyer's Edition 2nd 490 and 100 Supreme Court 558 (1980).

And, two, "The assertion of personal jurisdiction would comport with fair play and substantial justice." See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, at Pages 476, 85 Lawyers 2nd Edition 528, 105 Supreme Court 2174 (1985).

The burden to establish personal jurisdiction rests upon the plaintiff, Nicastro. See also *Carteret SA v. Bank*

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FA v. Shushan, 95 F.2d 141 at Page 146 (3rd Cir. 1992). See *Wartsila NSD North American v. Hill Intern Inc.*, Fed Supp 2d. 547, (DNJ 2003). See also *Citibank v. Simpson*, 290 N.J. Super. at Page 553.

First, the Court must analyze the defendant's contacts with New Jersey.

The record does not reflect any activity taken on the part of the defendant in the State of New Jersey. The defendant has no contacts with the State of New Jersey. Defendant JMM does not directly market itself and sell nor solicit business of anyone in New Jersey to buy its products, nor did it ever do so. See [68] Sally Johnson's certification, Paragraphs 14 to 22. The defendant JMM does not maintain sales staff in New Jersey, did not provide maintenance nor repair services for its products to businesses and/or individuals in New Jersey. See *Id.* once again, Sally Johnson's certification.

The defendant does not have an office in New Jersey. Does not advertise or solicit sales in New Jersey.

The Court is aware that your the website purportedly, but I find that to be passive and not to be organ to be targeted in New Jersey.

Defendant does not have a single contact with New Jersey, short of machining machining question ending up in this state.

Appendix G

The plaintiff alleges that McIntyre Machine American, Ltd, MMA, is an Ohio subsidiary of the defendant, but fails to produce any evidence as to that fact. Indeed, the evidence that MMA is not a subsidiary of JMM. See Sally Johnson's certification, Paragraph 8.

As a result, the plaintiff has failed to make a prima facie showing that defendant has sufficient minimal contacts with New Jersey to subject to personal jurisdiction in this state. See *Worldwide*, [69] *Supra*. See *Asahi Metal Industry Company Ltd. v. Superior Court of California*, 480 U.S. 102 (1987).

If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant, if that system purposely brought the defendant's shears machines to New Jersey. See *Asahi* at 112.

The fact that defendant may have sufficient minimum contacts with the United States to establish jurisdiction in this country does not reason to is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Notwithstanding the extensive additional jurisdictional period, *Supra*, the Court still finds that "there is insufficient evidence to sustain jurisdiction by adhering to the fundamentals as to which there remains little or no dispute." See the Appellate Division's opinion, *Supra.*, at Page 4; Movant's Exhibits F; and opinion of this Court dated March 5th, 2004, movant's

Exhibits D, as well as a paper submitted in opposition to this motion here.

The plaintiff cannot meet its burden to establish personal jurisdiction; indeed, even when purported even with purported contacts are random, [70] fortuitous, or attenuated, there can be no purposeful availment. See *Burger King, Supra* at 471 U.S. at 475 and *Worldwide Volkswagen, Supra.* at 298.

Assuming arguendo minimal contacts, the plaintiff has not established that the defendant could foresee itself being hailed into the Courts of New Jersey, even utilizing the stream of commerce theory.

This theory currently is unsettled in both federal and state law. See *Asahi, Supra.* and *Worldwide, Supra.* See *Cruz v. Robinson Engineering Corp.* at 253 NJ Super 66 (App. Div. 1992), and *Lebel v. Everglades Marina*, 115 N.J. at 317 (1989).

However, even utilizing the most liberal accepted form of stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey.

> "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce, with expectation that they will be purchased by customers in the forum state." *Worldwide* at 297, Page 298.

There is no evidence here establishing that [71] the defendant had any expectation that his product would be purchased and utilized in New Jersey.

Compare *LGE Electronics Inc v. First International Computer*, 138 F.Supp 2d 574 at Page 588 to 589 (DNJ 2001), which is readily distinguishable from the matter at bar.

There, in *LGE*, the party did not dispute that there was personal jurisdiction over FICA in the Northern District of California. Indeed, the Court, reading, was severed and sent back to Northern California in regard to FIC and FICA.

The Court in *LGA* (sic) continued its analysis in accordance with the following factors:

One, that the defendant purposely directed its activities at the residence of that forum, California.

Two, the claim arises out of or relates to those activities; and,

Three, the jurisdiction is constitutionally reasonable and fair. See *Genetics Implant Sys, Inc. v. Core-Vent*, 123 Fed. 3d 1455 at Page 1458 (Fed. Cir 1997).

Finally, FIC and FICA in *LGE* were manufacturer and subsidiary; clearly unlike the matter at bar.

Appendix G

[72] There's an assertion of a website see Exhibits F and G of the plaintiff's papers are unavailing. The website is passive and not interactive. Clearly not a purposeful availment to do business in this state. This is not a minimal contact, only conjecture. See certification of Sally Johnson, Paragraph 23 and Exhibit G of the plaintiff's opposition papers. See also *Machulky (sic) v. Hall* at 210 F.Supp 2d at 540.

Malchuky, Supra. at 540:

> "Absent a showing the defendant purposely directed its published statements toward the seller as either a businesswoman or attorney in New Jersey toward New Jersey residents or toward the State itself, the posting of information advertisement on a website does not afford personal jurisdiction over such a defendant." See *Malchuky, Supra.* at Pages 538-540.

The plaintiff seeks to rely on *Cruz, Supra* in opposing this motion. However, *Cruz* is easily distinguishable from the case at bar. Particularly, the plaintiff relies on the language in *Cruz* I'm sorry. I'm sorry.

Continuing.

[73] In *LG*, the Court found that FIC purposely directed its activities at California; thereby, the Court held that the stream of commerce theory was applicable

cause FIC was a had minimal contacts with California sufficient to satisfy this prong.

Here, plaintiff Nicastro have utterly failed to establish such minimum contact, as well as purposefully availment, or that the defendant purposely directed his activities to New Jersey.

It must be remembered that McIntyre Machinery of America, MMA, based in Ohio, was neither a subsidiary nor affiliated with JMM, nor corporate parent of MMA.

MMA is an entirely separate business entity, and JMM was never has never had nor shared either common owners, managers, or employees with MMA. See certification of Sally Johnson.

In contract, LE *LGE* case and this Court finds that there was a servant-and-master situation; that it is in that context, manufacturer and subsidiary.

This Court finds that the plaintiff has not met the minimum contacts. See *Worldwide Volkswagen Corp. Supra* at Pages 291 to 292.

As noted in *Worldwide Volkswagen*, *Supra* at [74] 292, quote:

> "The relationship between the defendant and the forum, here New Jersey, not the United States, must be such that it is reasonable to

> require the corporation" here the defendant JMM "to defend the particular suit which brought it there."

See also *Waste Manufacturers, Inc. v. Admiral Insurance Company* at 138 N.J. 106 at Page 119 (1994):

> "The minimum contact required must focus on 'the relationship among the defendant, the forum, and the litigation.'"

See *Lebel, Supra*, at Page 323, quoting *Shaffer v. Heitner* at 433 U.S. 186 at Page 204 (1977).

Continuing to read what I read abortedly initially:

The plaintiff seeks to rely on *Cruz Supra* in opposing this motion; however, *Cruz* is easily distinguishable from the case at bar. In particular, the plaintiff relies on the language in *Cruz* that states the additional relevant factors of this case based in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the [75] aforementioned minimum contacts and purposeful availment analysis. In addition, *Lebel, Supra* is more reliable, in that it was decided by the Supreme Court of New Jersey.

It should be also noted the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. See *Asahi, Supra.*

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The so-called stream of commerce theory is clearly unsupportable in the context of the facts at bar. See *Asahi, Supra.*

Involved a product liability case that grew out of a motorcycle accident in California. The allegations were that the motorcycle tire tube and sealant were defective. *Id.* at Page 105 to 106.

The plaintiff sued a Taiwanese manufacturer of the tube, which in turn filed a cross complaint for its indemnification against Asahi Industry, who had manufactured the tubes valve assembly. *Id.*, once again, at Page 107.

Comparable to the facts in this case *Asahi*, too, had no offices, property, no presence in the forum state of California, the forum. Asahi neither solicited business, nor made any direct sales in the state. Nor did it design or control the system of [76] distribution that brought its products into the forum state. *Id.* at 108.

Asahi challenged the personal jurisdiction in California.

While the decision was a plurality decision, the principles of *Asahi* obtain (sic) here. Justice O'Connor held that California Courts could not exercise personal jurisdiction over Asahi because "to do so would not comport with the notion of fair play and substantial justice as due process requires."

Appendix G

Four Justices, in an opinion written by Justice O'Connor, wrote that:

> "Defendant's awareness that the stream of commerce may or will sweep a product into the forum state does not convert the mere act of placing the product into the stream into an act purposely directed toward the forum state." *Id.* at Page 112.

Succinctly, Justice O'Connor held that:

> "The placement of a product in the stream of commerce without more is not an act of the defendant purposely directing to the forum state."

Under Justice O'Connor's plurality, that Four Justices the plaintiff must demonstrate [77] additional conduct that indicate an intent or purpose to serve the market in the forum state. See *Asahi, Supra.* at Page 112.

Justice Brennan wrote for the four other justices. He expressly rejected, "the additional conduct" requirement. Justice Brennan wrote with respect to "additional conduct," that:

> "The stream of commerce refers not to the unpredictable currents or eddies, but to the regular and anticipated flow of products from the manufacturer to the distribution to retail

> sale. As long as a participant in this process is aware that the final product is being marketed in the forum state, the possibility of a lawsuit there cannot come as a surprise." *Id.* at 117. (Emphasis added).

Suffice that both pluralities held that the scope of stream of commerce theory requires a finding of minimal contacts, which is inclusive of the purpose inclusive of purposeful availment by the defendant in the forum state. See *Asahi, Supra* and see *Renner v. Lanard Toys, Ltd.* at 33 F.3rd 277 at Page 282 (3rd Cir. 1994).

Here, either view of the pluralities of [78] *Asahi, Supra.* of the stream of commerce theory, the defendant JMM cannot be subject to personal jurisdiction of New Jersey. Therefore, the fact the defendant was injured in New Jersey does little to create personal jurisdiction over the defendant. As a result, the foregoing motion to dismiss for lack of personal jurisdiction is granted for these reasons stated.

Thank you for listening to be labor through the opinion and answering the tough questions here. It is an intriguing issue here, gentlemen. I appreciate your scholarly work and your arguments that you've presented in this matter.

I'll mark up the order and will submit a copy of the opinion, so you can proceed as you see fit.

Appendix G

Thank you all. Have a good weekend.

MR. GOOBY: Thank you, Your Honor.

MR. ROSS: Thank you, Judge.

(Proceedings concluded at 11:28 a.m.)

APPENDIX H OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DECIDED MAY 26, 2005

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3981-03T1

ROBERT NICASTRO and ROSEANN NICASTRO,

Plaintiffs-Appellants,

v.

McINTYRE MACHINERY AMERICA, LTD., and J. McINTYRE MACHINERY LTD.,

Defendants-Respondents.

Argued May 10, 2005 – Decided May 26, 2005

Before Judges Coburn, Wecker and Graves.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6857-03.

PER CURIAM

Plaintiffs, Robert and Roseann Nicastro, appeal from a summary judgment dismissing their complaint on the ground that defendant J. McIntyre Machinery Ltd. ("JMM"), was not subject to personal jurisdiction in New Jersey. We reverse and remand for discovery on the jurisdictional issue.

Appendix II

JMM is a British corporation located in Nottingham, England. It manufactures metal shearing machines. In 1994 or 1995, the owner of Curcio Scrap Metal ("Curcio"), a company located in New Jersey, attended a national conference in Las Vegas where he learned about JMM's shearing machine at an exhibition booth. The materials available indicated that the machine was distributed throughout the United States by defendant McIntyre Machinery America, Ltd. ("MMA"), an Ohio corporation with its principal place of business in Stow, Ohio. JMM denied having any legal relationship with MMA other than using it as its sole distributor in the United States until it went bankrupt in 2001, at which point JMM designated a Texas company as its sole distributor in the United States.

In 1995, Curcio ordered one of JMM's metal shearing machines, called a McIntyre Model 640 Shear, 440 volt, from MMA at a cost of $24,900. The machine was sent from JMM in England to MMA and then to Curcio, who received it in 1995. On October 11, 2001, Robert Nicastro, one of Curcio's employees, was severely injured while using the machine in the normal course of his duties. For present purposes we must assume that the injuries, which included amputation of several fingers, were due to defects in the machine that rendered it unsafe under our products liability law.

Although the record does not show whether JMM was the exhibitor in Las Vegas in 1994 or 1995, at a 2002 exhibition in Orlando, Florida, run by the same organization, JMM was listed as an exhibitor. Material

inappropriately submitted by the Nicastros in their reply brief indicates that JMM's new national distributor may have sold four JMM machines in New Jersey.

Although the form of service at the time of the motion was inadequate, as the judge properly found, JMM has since been adequately served under the Hague Convention. *In re Hayes Lemmerz Int'l, Inc.*, 271 *F. Supp.* 2d 1007 (E.D. Mich. 2003).

Plaintiffs contend that their evidence supports New Jersey jurisdiction under the stream-of-commerce doctrine endorsed by our Supreme Court in *Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 *N.J.* 460, 472 (1986). Alternatively, they argue that the trial court erred in denying them jurisdictional discovery.

In *Lebel v. Everglades Marina, Inc.*, 115 *N.J.* 317 (1989), which was decided after the United States Supreme Court's decision in *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 *U.S.* 102, 107 *S. Ct.* 1026, 94 *L. Ed.* 2d 92 (1987), the Court said that "little profit can be gained from an extended analysis of Supreme Court doctrine [on the stream-of-commerce] until the Court itself draws the lines as the umpire of federalism." *Lebel, supra*, 115 *N.J.* at 319. Our Supreme Court then noted that notwithstanding its decision in *Gendler*, and "[r]ather than embark[ing] on a prediction of the future course of this stream of jurisprudence," it would "hew closely to the limited fundamentals about which there is little or no dispute or debate." *Lebel, supra*, at 320.

Appendix H

In the instant case, there is insufficient evidence to sustain jurisdiction by hewing to the fundamentals as to which there is little or no dispute. However, further discovery may well show sufficient contacts without resorting to the stream-of-commerce doctrine. Moreover, such discovery may also demonstrate with greater clarity than is in the record before us that jurisdiction is warranted under the stream-of-commerce doctrine, either as espoused by our Supreme Court in *Gendler* or perhaps as espoused by Justice O'Conner in her plurality opinion in *Asahi*. Such discovery is clearly justified under our case law. *See, e.g., Citibank v. Estate of Simpson*, 290 *N.J. Super.* 519, 531 (App. Div. 1996).

Therefore, we reverse and remand for further proceedings which shall include complete jurisdictional discovery.

APPENDIX I ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY GRANTING J. McINTYRE MACHINERY LTD.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION DATED AND FILED MARCH 5, 2004

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - BERGEN COUNTY
DOCKET NO: BER-L-6857-03

ROBERT NICASTRO and ROSEANN NICASTRO, husband and wife,

Plaintiffs,

v.

McINTYRE MACHINERY AMERICA, LTD., J. McINTYRE MACHINERY LTD., JOHN DOES 1-10 (fictitious names), and XYZ CORPORATIONS 1-10 (fictitious names),

Defendants.

Civil Action

ORDER GRANTING J. McINTYRE MACHINERY LTD.'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

THIS MATTER was opened to the Court upon the application of Bressler, Amery & Ross, P.C., attorneys for J. McIntyre Machinery Ltd. for the entrance of an

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Order granting its motion to dismiss it from this action for this Court's lack of personal jurisdiction over it and, in the alternative, for the entrance of an order quashing plaintiffs' service of process upon it. The Court has reviewed the moving and opposing papers and for good cause shown

IT IS on this 5th day of March, 2004

ORDERED that defendant J. McIntyre Machinery Ltd.'s motion to dismiss it from this civil action for this Court's lack of personal jurisdiction over it be and hereby is granted; and

IT IS FURTHER ORDERED that a true copy of this Order shall be served upon all counsel of record within seven (7) days from the entrance hereof.

s/ Elijah L. Miller, Jr.
Elijah L. Miller, Jr., J.S.C.

APPENDIX J MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(f) DATED MARCH 5, 2004

MEMORANDUM OF DECISION OF MOTION PURSUANT TO RULE 1:6-2(F)

TO: Mark McMenamy, Esq.
P.O. Box 1980
Morristown, NJ 07962

Alexander Ross, Esq.
76 East Main Street
Marlton, NJ 08053-2142

RE: Nicastro v. McIntyre Machinery America, Ltd., *et al.*
Docket Number BER-L-6857-03
Motion to Dismiss for Lack of Personal Jurisdiction
March 5, 2004

STATEMENT OF FACTS

While at work at Curcio Scrap Metal in Saddle Brook, New Jersey, the plaintiff was injured by a shear manufactured and shipped to the United States by J. McIntyre Machinery, Ltd.

MOVANT'S ASSERTIONS

The defendant J. McIntyre Machinery, Ltd. (J. McIntyre) is a corporation organized under the laws of the United Kingdom with its principal place of business being in Nottingham, England. J. McIntyre manufactures and ships shearing machines. In 1995,

J. McIntyre manufactured the machine at issue in this case and shipped it to a purchaser in Stow, Ohio. The purchaser, McIntyre Machinery America, Ltd. (MMA) is an Ohio corporation with its principal place of business in Stow, Ohio. MMA is not now nor has it ever been affiliated with J. McIntyre. MMA is a separate entity with no common owners or managers with J. McIntyre. As a result, J. McIntyre does not have any knowledge of the transactions made by MMA and other entities.

New Jersey's long-arm rule provides for the assertion of personal jurisdiction consistent with due process of law. Rule 4:4-4(b)(1). This court may exercise personal jurisdiction over J. McIntyre if both requirements of a two-prong test prescribed by the due process clause are satisfied. *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 322 (1989). First, the court must determine that the defendant has sufficient minimum contacts with the forum state. Second, the court must find that it would comport with traditional notions of fair play and substantial justice to assert jurisdiction over the defendant. When a defendant contests personal jurisdiction the plaintiff bears the burden of establishing the defendant's contacts with the forum state are sufficient to permit the court to exercise personal jurisdiction over it. *A.V. Imports, Inc. v. Col de Fratta S.P.A.*, 171 F. Supp. 2d 369, 371 (D.N.J. 2001). The plaintiff must establish either specific jurisdiction, that the particular cause of action arose from the defendant's activities in the forum state, or general jurisdiction, that the defendant has continuous and systematic contacts with the forum state. *Waste Management, Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119 (1994).

First, the court must examine whether minimum contacts with New Jersey exist. "The relationship between the defendant and the forum must be such that it is reasonable to require the corporation to defend the particular suit which is brought there." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). It is essential, therefore, that the defendant purposefully availed itself of conducting activities with the forum state. *Hanson v. Denckla,* 357 U.S. 235 (1958). The plaintiff cannot meet this burden because J. McIntyre never purposefully availed itself of the privilege of doing business in New Jersey. J. McIntyre has never sold or shipped any machine to a customer in New Jersey. Also, it has no presence in this state. Since J. McIntyre did not engage in any purposeful activity in New Jersey, the court should grant its motion to dismiss for lack of personal jurisdiction.

J. McIntyre has no contacts with New Jersey. Although the shearing machine at issue wound up in New Jersey, J. McIntyre sold the machine to an Ohio based purchaser and had no knowledge that the machine would one day be shipped into New Jersey. J. McIntyre's act of placing the machine into the stream of commerce elsewhere is not enough to satisfy the due process requirements necessary for this court to exercise personal jurisdiction over it. In *Asahi Metal Indus. Co. v. Superior Ct. of California,* 480 U.S. 102 (1987), the United States Supreme Court held that merely placing a product into the stream of commerce elsewhere, even with some awareness that the product may ultimately reach the forum state, does not constitute purposeful

availment of the forum state and thus cannot be deemed a sufficient minimum contact with the forum state for personal jurisdiction purposes. The circumstances presented in *Asahi* are analogous to those in this case. J. McIntyre is an overseas company that never entered New Jersey to sell any product. It has no offices, agents, employees, or property in New Jersey. J. McIntyre has never advertised in New Jersey nor solicited the business of anyone to buy its product in this state. Nor did J. McIntyre engage in any additional conduct beyond placing the machine into the stream of commerce elsewhere that is sufficient to establish minimum contacts.

It is also important to note that the plaintiffs failed to effect service of process as required by international law and the rules of the court. Service of process is deeply rooted in basic constitutional protections. Due process requires that defendants be given notice and an opportunity to defend. In addition, an international treaty applies here. "The Hague Convention provides a mechanism by which a plaintiff authorized to serve process under the laws of its own country can effect service that will give appropriate notice to the party being served and will not be objectionable to the country in which the party is served." *Gapanovich v. Komori Corp.*, 255 N.J. Super. 607, 611 (App. Div. 1992). On this basis alone, the court should quash service of process and ensure that proper service, by way of the Hague Convention, is made upon J. McIntyre so that the plaintiffs can obtain a valid judgment. The plaintiffs purported to serve J. McIntyre by sending a copy of

the summons and complaint to Bobby Alexander, an employee of a Texas company that purchases J. McIntyre machines, of Fort Worth, Texas. J. McIntyre learned of this lawsuit when Mr. Alexander's lawyer faxed J. McIntyre a copy of the papers purportedly served on Mr. Alexander. Mr. Alexander is not a director, officer, trustee, or employee of J. McIntyre nor is he authorized to accept service of process on behalf of J. McIntyre. As a result, this court must order the plaintiff's purported service of process squashed so that proper service can be obtained.

OPPOSITION

On a motion to dismiss for lack of personal jurisdiction, a court must accept as true the uncontroverted allegations of the party seeking to assert jurisdiction and resolve in its favor all conflicts between the facts contained in the parties' affidavits and other documents. Rule 4:6-2. Thus, where no discovery has been conducted and no evidentiary hearing held, the plaintiff only has to make a prima facie showing that jurisdiction is proper.

New Jersey has a long-arm rule that permits its courts to exercise personal jurisdiction over nonresident defendants within the borders of due process of law. Rule 4:4-4(b)(1). Due process requires the defendant to have minimum contacts with New Jersey such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).

The minimum contacts inquiry examines the defendant's purposeful activity within the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The minimum contacts requirement may be satisfied under the stream of commerce theory. "If the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence but arises from the efforts of the manufacturer or distributor to serve directly or indirectly the market for its product in other states, it is not unreasonable to subject it to suit in one of those states. The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased in the forum state." *World-Wide* at 297-298. The New Jersey Supreme Court adopted the stream of commerce theory in *Charles Gendler & Co. v. Telecom Equipment Corp.*, 102 N.J. 460, 472 (1986). In *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989), the New Jersey Supreme Court noted that this theory may have become unsettled after the decision rendered in *Asahi*, supra. In *Cruz v. Robinson Engineering*, 253 N.J. Super 66 (App. Div.) *certif. denied*, 160 N.J. 9 (1992), the court concluded that the stream of commerce theory was not rejected but merely disfavored only if personal jurisdiction could be established under the traditional minimum contacts analysis.

The interests in New Jersey in adjudicating this personal injury action involving a resident working in a New Jersey factory greatly outweigh any burden to

J. McIntyre. The machine, plaintiff and plaintiff's employer are all here in New Jersey. In fact, there is no better forum than New Jersey for adjudicating this matter. For these reasons, the plaintiff requests that the defendant's motion to dismiss for lack of personal jurisdiction be denied.

As to service of process, the plaintiff is currently in the process of serving J. McIntyre via the Hague Convention. If personal service has not been completed by the time this motion is considered, it soon will be. The plaintiff, therefore, requests that its complaint not be dismissed on the basis of failure to comply with the Hague Convention.

REPLY

The personal jurisdiction argument that is before the court is an interesting legal issue as it relates to the stream of commerce theory of jurisdiction. Nonetheless, this legal question is easy to resolve on the factual record before the court. In *Asahi*, supra, the United States Supreme Court agreed that California could not exercise personal jurisdiction over Asahi, a Japanese manufacturer that had made a component of the tube valve assembly that had been incorporated into the motorcycle that the plaintiff had been riding. Since Asahi had no offices, property or agents in California, solicited no business from and made no direct sales to California, and did not control the system of distribution that resulted in its products being brought to California, it did not have sufficient contacts with California to support the exercise of personal jurisdiction.

Appendix J

Since *Asahi*, the United States courts have been inconsistent in their application of the decision. The stream of commerce cases cited by the plaintiff are readily distinguishable from the facts at hand and do not support the exercise of personal jurisdiction over J. McIntyre. In *Dave's Trash Removal v. Charm City*, 214 N.J. Super. 497 (App. Div. 1987), the court concluded that the defendant, a Maryland corporation, could be sued in New Jersey because it contracted to sell a garbage truck to a New Jersey resident. In addition, there were extensive and direct dealings between the Maryland defendant and the New Jersey plaintiff. The direct contacts between the defendant and New Jersey in that case have not been replicated by J. McIntyre in the matter at hand. In *Cruz v. Robinson Engineering*, 253 N.J. Super. 66 (App. Div. 1992), the Appellate Division noted that the viability of the stream of commerce theory of jurisdiction had been left unsettled since *Asahi*. The court stated that jurisdiction over a foreign defendant "depends on whether the subject of the litigation arises out of . . . specific jurisdiction, or . . . general jurisdiction." *Asahi* at 72.

The defendant submits that the controlling law with respect to the facts and circumstances surrounding the J. McIntyre shear at issue are most analogous to those in *Max Daetwyler Corp. v. R. Meyer*, 762 F.2d 290 (3rd Cir. 1985). All that is before the court is evidence of one isolated fortuitous sale of a J. McIntyre shear into New Jersey that was arranged and concluded by others without McIntyre's knowledge or involvement. *World-Wide Volkswagen* states that such isolated sales, which

were caused by others, are not sufficient to support the exercise of personal jurisdiction over a foreign manufacturer. *World-Wide Volkswagen* at 297-298. For these reasons, the motion to dismiss should be granted.

Plaintiff's counsel has acknowledged that service of process has not been legally made and is currently in the process of attempting to serve J. McIntyre in accordance with the requirements of the Hague Convention. Thus, at the very least, the motion to quash the service of process should be granted.

SURREPLY

The cases relied upon by the defendant concern foreign manufacturers of component parts who sell that part to another foreign company who, in turn sells a product made with that component to the United States. In the present case, J. McIntyre designed and manufactured the entire machine and shipped it to MMA in Ohio. J. McIntyre continues to ship its completed products to the United States for distribution throughout the entire country. In addition, it holds United States patents on its machines, attends industry conferences in this country, and incorporates United States standards into its instruction manual. Since J. McIntyre actively pursues sales of its products throughout the United States, it cannot be surprised that it is being brought into court in New Jersey. The court must consider whether the maintenance of this suit in New Jersey offends traditional notions of fair play and substantial justice. *In re Automotive Refinishing*

Paint Antitrust Litigation, 2004 WL 258661 (3rd Cir. February 13, 2004). In this case, certainly such notions have not been offended. In order to prevail on this motion, the plaintiff need only make a prima facie showing that personal jurisdiction exists. The facts presented in this matter have accomplished this.

In regard to the motion to quash service, service as per the Hague Convention takes up to sixteen weeks to be completed. Currently, the plaintiff has begun this process. To quash service under these circumstances merely delays the inevitable.

COURT'S REASONING AND FINDING

In order to determine whether personal jurisdiction can be exercised over the defendant, the court must determine whether there are sufficient minimum contacts such that the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The minimum contacts portion of the analysis, if there is no general jurisdiction as in this case, requires the defendant to have purposefully availed itself of the protection of the laws of New Jersey through its conduct in this state. This means that the defendant must have itself created a substantial connection with New Jersey. The second part of the analysis examines the foreseeability of being brought to court in New Jersey. Foreseeability alone is not the only requirement under this portion of the personal jurisdiction analysis. The defendant must have delivered its product into the

stream of commerce with the expectation that the product would be purchased by consumers in New Jersey. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

First, the court must analyze the defendant's contacts with New Jersey. The record does not reflect any activity taken on the part of the defendant in the state of New Jersey. The defendant does not have an office in New Jersey nor does it advertise or solicit sales in this state. The plaintiff alleges that McIntyre Machinery America, Ltd. (MMA) is an Ohio subsidiary of the defendant but does not produce any evidence as to that fact. As a result, the plaintiff has failed to make a prima facie showing that the defendant has sufficient minimum contacts with New Jersey to subject it to personal jurisdiction in this state. See *World-Wide*, supra; *Asahi Metal Industry Co. Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). If the plaintiff were able to establish that the defendant has established a distribution system in the United States, it might be able to establish personal jurisdiction over the defendant if that system purposefully brought the defendant's shear machines to New Jersey. *Asahi* at 112. However, since this is not a federal suit, the fact that the defendant may have sufficient aggregate minimum contacts with the United States to establish jurisdiction in this country is not a reason to extend jurisdiction to the Superior Court of New Jersey.

Assuming arguendo minimum contacts, the plaintiff has not established that the defendant could foresee

itself being haled into court in New Jersey even utilizing a stream of commerce theory. This theory is currently unsettled in both federal and state law. See *Asahi*, supra; *World-Wide*, supra; *Cruz v. Robinson Engineering Corp.*, 253 N.J. Super. 66 (App. Div. 1992); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317 (1989). However, even utilizing the most liberal accepted form of the stream of commerce theory, the defendant would not be subject to personal jurisdiction in New Jersey. "The forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state." *World-Wide*, at 297-298. There is no evidence here establishing that the defendant had any expectation that its product would be purchased and utilized in New Jersey.

The plaintiff seeks to rely upon *Cruz*, supra in opposing this motion. However, *Cruz* is easily distinguishable from the case at bar. In particular, the plaintiff relies upon the language in *Cruz* that states that additional relevant factors of the case balance in favor of New Jersey's exercise of jurisdiction. However, the Appellate Division only reached that conclusion after applying the aforementioned minimum contacts and purposeful availment analysis. In addition, *Lebel*, supra is more reliable in that it was decided by the Supreme Court of New Jersey. It should also be noted that the Supreme Court of the United States has stated that the defendant itself must create a substantial connection with the forum state. *Asahi*, supra. Therefore, the fact

that the plaintiff was injured in New Jersey does little to create personal jurisdiction over the defendant.

As a result of the foregoing, the motion to dismiss for lack of personal is granted. In addition, service of process is quashed.

s/ Elijah L. Miller, Jr.
Hon. Judge Elijah L. Miller, Jr., J.S.C.